TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 756.

ASSOCIATION

SAMUEL A. PEUGH, APPELLANT,

vs.

HENRY S. DAVIS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 22, 1883.

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1 *Original Bill. Filed July* 13, 1869.

In the Supreme Court of the District of Columbia, June 28, 1869.
Equity.

SAMUEL A. PEUGH
vs.
HENRY S. DAVIS. } 1713.

To the supreme court of the District of Columbia, holding an equity court for said District:

The plaintiff complains as follows:

1st. He is a citizen of Washington, District of Columbia, and on or about the month of March, 1857, applied to defendant, Henry S. Davis, who is also a citizen of said city and District, for a loan of $2,000, which loan the said defendant agreed to make to the plaintiff for the period of sixty days, upon the conditions, first, that the plaintiff should pay to him interest at the rate of about 3¾ per cent. per month; and secondly, that the plaintiff should, as security for said loan, give to the defendant a deed absolute in form for certain squares of ground owned by the plaintiff in said city and District, to wit, squares numbered 910 and 911. And to these said conditions the plaintiff was compelled by the pressure then upon him to submit; and accordingly, for said loan of $2,000 for 60 days, he paid the defendant interest at the rate of 3¾ per cent. per month, and, as security for repayment of said loan, he made, on the 4th day of March, 1857, a conveyance of said property absolute in form, a copy of which is herewith filed, marked Exhibit A, with the agreement, understanding, and contract between said parties that upon repayment of said loan within the said sixty days, the said conveyance should be null and void; that it should in meanwhile not be recorded, and that upon repayment as aforesaid of said loan, the said deed should be returned by the defendant to the plaintiff. And upon the expiration of said period of sixty days, the plaintiff did repay to the defendant said loan, principal and interest, and the defendant pocketing for the use of his money interest at the rate of 45 p'r cent. per annum, returned to the plaintiff said deed.

2d. In or about the month of July, 1857, the plaintiff borrowed from the defendant the sum of $1,500, under conditions exacted by the defendant (who well knew the necessity of the plaintiff) as hard as those of the former loan. For the said loan of $1,500 for the period of 60 days, the defendant required and received from the plaintiff interest at the rate of 3¾ per cent. per month; and as security for repayment of said loan, the plaintiff deposited with the defendant the deed hereinbefore mentioned, with the explicit and complete understanding, agreement, and contract between the plaintiff and defendant, that the said deed was so deposited only as security for the repayment of said loan, that it should not meanwhile be recorded, and that upon repayment of said loan it should be delivered up to plaintiff, and that except for the purpose and in the manner herein stated, the whole operation, force, and effect of said

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1st. He is a citizen of Washington, District of Columbia, and on or about the month of March, 1857, applied to defendant, Henry S. Davis, who is also a citizen of said city and District, for a loan of $2,000, which loan the said defendant agreed to make to the plaintiff for the period of sixty days, upon the conditions, first, that the plaintiff should pay to him interest at the rate of about 3¾ per cent. per month; and secondly, that the plaintiff should, as security for said loan, give to the defendant a deed absolute in form for certain squares of ground owned by the plaintiff in said city and District, to wit, squares numbered 910 and 911. And to these said conditions the plaintiff was compelled by the pressure then upon him to submit; and accordingly, for said loan of $2,000 for 60 days, he paid the defendant interest at the rate of 3¾ per cent. per month, and, as security for repayment of said loan, he made, on the 4th day of March, 1857, a conveyance of said property absolute in form, a copy of which is herewith filed, marked Exhibit A, with the agreement, understanding, and contract between said parties that upon repayment of said loan within the said sixty days, the said conveyance should be null and void; that it should in meanwhile not be recorded, and that upon repayment as aforesaid of said loan, the said deed should be returned by the defendant to the plaintiff. And upon the expiration of said period of sixty days, the plaintiff did repay to the defendant said loan, principal and interest, and the defendant pocketing for the use of his money interest at the rate of 45 p'r cent. per annum, returned to the plaintiff said deed.

2d. In or about the month of July, 1857, the plaintiff borrowed from the defendant the sum of $1,500, under conditions exacted by the defendant (who well knew the necessity of the plaintiff) as hard as those of the former loan. For the said loan of $1,500 for the period of 60 days, the defendant required and received from the plaintiff interest at the rate of 3¾ per cent. per month; and as security for repayment of said loan, the plaintiff deposited with the defendant the deed hereinbefore mentioned, with the explicit and complete understanding, agreement, and contract between the plaintiff and defendant, that the said deed was so deposited only as security for the repayment of said loan, that it should not meanwhile be recorded, and that upon repayment of said loan it should be delivered up to plaintiff, and that except for the purpose and in the manner herein stated, the whole operation, force, and effect of said

deed should be defeated, and that upon repayment as aforesaid it should be wholly null and void.

At the expiration of said period of 60 days, for which this said loan of $1,500 was made, the plaintiff was unable to repay it, and applied to defendant for an extension of time to another 60 days, in consideration of the usury which defendant had already extorted, and of the valuable security which he held, which said extension of time defendant agreed to give, and also to make an additional loan of $500, upon the payment of an additional bonus at the same rate as upon the other loan, to wit, at 3½ p'r cent. per month, and upon the execution of a further instrument of similar tenor and effect to the aforesaid deed, and he, the defendant, represented to the plaintiff that this additional instrument was rendered necessary by the further advance of money aforesaid, and that the relations of said parties would continue unchanged; that the plaintiff was merely borrower, and the defendant lender; that the said conveyance, both by the original deed and the said second instrument, was, and should continue, only security for the repayment of said loans (to wit, $1,500 and $500), principal and interest, and, except as such security, should have none other operation and effect; and before the plaintiff would consent to execute said paper, he called on the defendant's conveyancer, William H. Ward, Esq., who, as the plaintiff knew, had been in consultation with the defendant on this point, and asked whether fraud on the part of the defendant could give the said conveyance an other operation than as aforesaid, and whether the plaintiff would be safe in executing said paper, under all the circumstances, and whether defendant could or would in any way take advantage of it to the injury of the plaintiff. Whereupon the said conveyance of the defendant replied that he understood the transaction as a loan, with the said instrument as security for the repayment thereof, and he thought there was no danger whatever in executing the paper, and that he thought the defendant would take no advantage of it, and thereupon the second instrument was executed by the plaintiff and delivered to the defendant.

Subsequently the defendant dunned plaintiff for repayment of said loan, but being then embarrassed by liabilities incurred as security, the plaintiff was at the time of such application unable to pay him. The defendant afterward called upon the plaintiff to pay him further and frequent and regular instalments of interest upon said loan at the rate of 2½ per cent. per month. Being unable to comply with the extortionate demand, the plaintiff endeavored to sell said property, but was unable to do so, except at a sacrifice greater than he was willing to make. The plaintiff never supposed that the defendant would ever enter upon possession temporarily of said property, and not until he, the plaintiff, made a lease of a portion thereof to George Simms (colored), who erected a frame house *house* thereon at a cost of several hundred dollars, in 1865, did ascertain such entry to have been made. The plaintiff is advised that at the most the defendant's entry and possession could only be as mortgage, and until repayment of said loan.

5th. The said property is now worth about $30,000, and the defendant is in enjoyment of all its rents and profits. And though the plaintiff has always expected to repay said loan, and is ready and willing to do so forthwith, and has tendered, and hereby tenders, repayment of the same, and for said purpose has required of the defendant a statement of accounts and especially of the rents and profits received, or which might with reasonable diligence have been received from said property by the defendant; yet the defendant refuses to comply with said requests of plaintiff to redeem said property and surrender up possession of the said deeds and property, and the plaintiff fears that the defendant means to defraud him of all his rights in the premises.

3 *Prayers.*

The plaintiff therefore prays:

1st. That an account may be taken of what is due the defendant for principal and interest on the said loans, and also for the rents and profits which have been, or without neglect or default on his part might have been, received by the defendant.

2d. That the plaintiff be permitted to redeem the said property, being ready and willing, and hereby offering to pay what shall, upon a statement of account, appear to remain due in respect to the loan, as security for which said conveyance of the property was made as aforesaid.

3d. That the said conveyance, and all deeds and instruments executed in pursuance thereof as aforesaid, be decreed to be null and void.

4th. That the defendant be decreed to convey the said property and deliver up possession thereof to the plaintiff, free from all encumbrances, of whatsoever character, made by the defendant or any person claiming under him; and to deliver over to plaintiff all deeds and writings in his custody or power relating to the said premises.

5th. That the defendant be enjoined from aliening in any manner whatsoever the said premises; from creating any lien or incumbrance whatsoever on the same; and that by decree of this court a receiver be appointed, and receive and hold, subject to the order of this court, the rents and profits of the same.

6th. That such other and further relief be afforded him as equity and the nature of the case may require.

SAML A. PEUGH.

R. T. MERRICK,
E. L. STANTON,
Solicitors for Plaintiff.

I do solemnly swear that I have read the foregoing bill by me subscribed, and know the contents therein —, and that the facts therein stated, upon my personal knowledge, are true, and the facts therein stated, upon information and belief, I believe to be true.

S. A. PEUGH.

Sworn to and subscribed before me, this thirteenth day of July, 1869.

R. J. MEIGS, *Clerk.*

EXHIBIT A.

Deed. Recorded 7th Sept., 1857.

SAM'L A. PEUGH & WIFE to HENRY S. DAVIS.

This indenture, made the fourth day of March, in the year of our Lord one thousand eight hundred and fifty-seven, between Samuel A. Peugh and Caroline E., his wife, of the city of Washington, in the District of Columbia, of the first part, and Henry S. Davis, of the said city of Washington, of the second part, witnesseth:

That the said Samuel A. Peugh and his said wife, for and in consideration of the sum of two thousand dollars, in lawful money of the United States, to them in hand paid by the said Henry S. Davis, at and before the sealing and delivery of these presents, the
4 receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released, and conveyed, and do by these presents grant, bargain, sell, alien, enfeoff, release, and convey, unto the said Henry S. Davis, his heirs and assigns, forever, all those certain pieces or parcels of ground situate and lying in the said city of Washington, and known and described as being all of squares numbered nine hundred and ten (910) and nine hundred and eleven (911), as the same are laid down on the public plan of said city, together with all the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in any wise appertaining, and all the remainders, reversions, rents, issues, and profits thereof; and all the estate, right, title, interest, claim, and demand, either at law or in equity, or otherwise, however, of the said parties of the first part, of, in, to, or out of the said pieces or parcels of ground and premises; to have and to hold the said pieces or parcels of ground and premises and appurtenances unto the said Henry S. Davis, his heirs and assigns, to his and their sole use, benefit, and behoof forever. And the said Samuel A. Peugh, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree to and with the said Henry S. Davis, his heirs and assigns, that the said Samuel A. Peugh and his heirs shall and will warrant and forever *and forever* defend the said pieces or parcels of ground and premises and appurtenances unto the said Henry S. Davis, his heirs and assigns, from and against the claims of all persons claiming or to claim the same, or any part thereof, by, from, under, or through the said Samuel A. Peugh and his heirs, or any of them. And further, that the said Samuel A. Peugh and his heirs shall and will, at any and all times hereafter, upon the request and at the cost of the said Henry S. Davis, his heirs or assigns, make and execute all such other deed or deeds or other assurance in law for the more certain and effectual conveyance of the said pieces or parcels of ground and premises and appurtenances unto the said Henry S. Davis, his heirs or assigns, as the

said Henry S. Davis, his heirs or assigns, or his or their counsel learned in the law, shall advise *advise* or require.

In testimony whereof, the said Samuel A. Peugh and his said wife have hereunto set their hands and seals on the day and year first hereinbefore written.

SAML A. PEUGH. [SEAL.]
CAROLINE S. PEUGH. [SEAL.]

Signed, sealed, and delivered in the presence of—
JOHN S. HOLLINGSHEAD.
L. K. OFFUTT.

DISTRICT OF COLUMBIA, } *ss:*
County of Washington, }

We, John S. Hollingshead and L. K. Offutt, justices of the peace in and for the county of Washington aforesaid, in the said District, do hereby certify that Samuel A. Peugh, a party to a certain deed bearing date on the fourth day of March, A. D. 1857, and hereunto annexed, personally appeared before us in our county aforesaid, the said Samuel A. Peugh being personally well known to us to be the person who executed the said deed, and acknowledged the same to be his act and deed.

Given under our hand and seals, this fifth day of March, A. D. 1857.

JOHN S. HOLLINGSHEAD, *J. P.* [SEAL.]
L. K. OFFUTT, *J. P.* [SEAL.]

5 DISTRICT OF COLUMBIA, } *ss:*
County of Washington, }

We, John S. Hollingshead and ———, justices of the peace in and for the county of Washington aforesaid, in the said District, do hereby certify that Caroline S. Peugh, a party to a certain deed bearing date on the fourth day of March, A. D. 1857, and hereunto annexed, personally appeared before us in our county aforesaid, the said Caroline S. Peugh being personally well known to us to be the person who executed the said deed, and being by us examined separate and apart from her husband, and having the deed aforesaid fully explained to her, the said Caroline S. Peugh acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under our hands and seals, this fifth day of March, A. D. 1857.

JOHN S. HOLLINGSHEAD, *J. P.* [SEAL.]
L. K. OFFUTT, *J. P.* [SEAL.]

Subpœna.

In the Supreme Court of the District of Columbia, July 13, 1869.

SAMUEL A. PEUGH, Complainant,
against
HENRY S. DAVIS, Defendant. } No. 1713. Eq. Doc. 9.

The President of the United States to Henry S. Davis:

You are hereby commanded to appear in this court, at its first special term occurring twenty days after service of this subpœna, and answer the exigency of the bill, under pain of attachment and such other process of contempt as the court shall award.

Witness D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk, &c.*

Summoned July 13, 1869.

A. SHARP, *Marshal.*

Answer. Filed Aug. 14, 1869.

In the Supreme Court of the District of Columbia.

SAMUEL A. PEUGH }
vs. } No. 1713. Eq.
HENRY S. DAVIS. }

The answer of Henry S. Davis to the bill of complaint of Samuel A. Peugh.

This defendant, saving all benefit of exceptions to the many errors, uncertainties, and other imperfections in the said bill contained, for answer thereunto, or unto so much and such parts thereof as he is advised it is necessary or material for him to make answer, answering, says:

Some time in the month of May, 1857, this defendant loaned to the complainant the sum of fifteen hundred dollars for the period of sixty days; and received from the complainant as security for
6 said loan a deed of conveyance, whereof Exhibit A, filed with the bill, is admitted to be a true copy, which deed, it was agreed between this respondent and the complainant, should not be placed upon record until the expiration of said sixty days; the complainant having failed to pay said debt at maturity, this defendant shortly thereafter called upon him and demanded payment, but the complainant failed to make payment of said debt, or any part thereof, principal or interest. This defendant renewed his application for payment from time to time, but with a like result, and repeatedly offered to accept the payment of said principal in full discharge of the debt, and thereupon to reconvey to the complainant the property mentioned in the aforesaid deed, but the complainant refused to pay said principal, though abundantly able so to do, as this defendant is prepared to prove.

Under these circumstances this defendant placed said deed upon record on the 7th of September, 1857, about two months after the

payment of said debt had matured. When said deed was delivered to this defendant as aforesaid, the squares of ground therein mentioned, being Nos. 910 and 911, were claimed by one Charles H. Wiltberger, by virtue of a sale made thereof by the city of Washington for non-payment of taxes, and conveyances in pursuance thereof, and suit had been threatened by said Wiltberger, but this defendant was, notwithstanding said outstanding claim, induced to make said advance by reason of the ability of the complainant to pay, and the confidence in his integrity and sense of justice then entertained by this defendant. On or about the 16th of January, 1858, the said Charles H. Wiltberger instituted two suits in ejectment against this defendant in the late circuit court of the District of Columbia for the recovery of said squares of ground. Thereupon this defendant again demanded payment of his debt, but the complainant failed and refused to pay said debt, or any part thereof, falsely pretended want of means, but offered to sell out all his interest in said property at and for the further sum of five hundred dollars, which sum this defendant refused to pay, but again offered to take said principal in full satisfaction of said debt, which offer the complainant refused, but *reserved* his said proposition to sell, and that, in the course of negotiations, this defendant having, among other objections to making said purchase, referred to the said suits then pending, the complainant thereupon offered and agreed, in consideration of the sum of $500 to be made by this defendant, to release all equity of redemption, interest, or estate in said squares to this defendant, and to indemnify and save harmless this defendant against said suits, and generally to warrant and defend the title to said squares of ground. To this proposition of the complainant this defendant assented, and on or about the 9th of February, 1857, he and the complainant met at the office of William H. Ward, Esq., a member of the bar of said court, and then and there carried into execution said contract according to the instructions and advice of said Ward, the complainant executing the covenant whereof a copy is herewith filed, marked "H. S. D., Exhibit No. 1," and prayed to be taken as part hereof, and this defendant thereupon paying to the complainant the agreed sum of five hundred dollars, and taking a receipt, annexed to said covenant, for $2,000, in full for the purchase of said squares, a copy of which receipt is annexed to the last-mentioned exhibit. This defendant avers that both said original covenant and receipt were drawn by said Ward, and are now in his handwriting, and were intended to carry into full effect and execution the contract aforesaid, and this defendant is informed and be-

7 lieves that a new deed of conveyance was not drawn by said Ward, because of the fact that the deed delivered to this defendant was then upon record and upon its face conveyed the said squares absolutely to this defendant. And this defendant avers and is prepared to prove that the intention as well of the complainant as this defendant, as communicated by both to said Ward to be carried into execution, was as hereinbefore set forth, this defendant to be indemnified as aforesaid, and thereupon and on

the payment of said additional sum of five hundred dollars to become the exclusive and absolute owner of said squares of ground.

This defendant further says that the purchase-money paid by him as aforesaid was the full value of said squares of ground under the circumstances surrounding the same, and in view of the depression in value of real estate in said city, owing to the financial crisis which then prevailed throughout the country.

This defendant further says that the said claim of Wiltberger to said squares was tried at May term, 1858, and determined in favor of this defendant, and that exceptions having been taken pending the trial, a writ of error was sued out by said Wiltberger from the Supreme Court of the United States, and that owing to the failure of said Wiltberger to docket said suit, or other cause, the said writ of error, which had by the advice of the counsel of this defendant been permitted to lie, was, after the lapse of five years from the judgment below, and when too late to sue out a new writ, dismissed by esaid ourt;

This defendant further says that upon his said purchase, on the 9th of February, 1858, which purchase he avers was forced upon him by the refusal of the complainant to make provisions for said debt, or even to pay the principal thereof, this defendant entered into possession of said square of ground, and has since held said possession and has paid from time to time the taxes levied thereon, including a large special tax for grading and paving, and has in all respects exercised the rights and discharged the duties appertaining to ownership, and that he has acted as aforesaid with the full knowledge and acquiesence of the complainant, who, until the filing of the bill in this cause, never at any time asserted or pretended to this defendant to hold any resulting trust or other interest whatsoever in the said squares of ground, or either of them.

It is true that the said squares of ground, nearly valueless for one or two years after the commencement of the rebellion, as this defendant avers they were, have since largely increased in value, being now worth about $9,000 or $10,000, one-third the value falsely alleged in the bill, which increase mainly took place in or about 1864, when the impending fate of the rebellion gave promise of a prosperous future to said city. And this defendant believes and avers that said increase in value induced the complainant to attempt to repudiate his sale made as aforesaid. In support of this allegation this defendant shows, upon information and belief, that early in October, 1865, the defendant falsely pretended to William J. Stone, Esq., counsel for Samuel Cole, that he, the complainant, was entitled to an equity of redemption in said squares of ground; and that said equity, when established by decree, could be subjected to the payment of a judgment recovered by said Cole in 1863 against the complainant for the sum of $684.83, with interest from the 6th of May, 1855, and costs of suit, and endeavored to induce said Stone to file a bill in equity against the complainant and this defendant for the establishment of said equity; and that said Stone, having yielded to the persuasion of the complainant, and it
8 being necessary to revive the said judgment for the want of execution, a *sci. fa.* was issued thereon on the 10th of Octo-

ber, 1865; and that the complainant thereupon, on the same day, and for the corrupt purpose of aiding said proceeding, ordered a fiat to be entered immediately by the court, which having been done, and a *fieri facias* issued on the next day, and returned on the 17th of October, 1865, *nulla bona*, on the same day said bill in equity was filed at the instance of said Stone; and that said bill was duly answered on the 8th of November following by this defendant, who alleged his said purchase; but that the complainant purposely refrained from answering said bill, and that upon the filing of the answer of this defendant, and the exhibition to said Stone of the evidences of purchase, the said bill was ordered to be dismissed. And in further support of said allegation, this defendant says that in the summer of 1865, and after said increase in value of said squares, the complainant clandestinely, and without the knowledge or consent of this defendant, and well knowing that said squares of ground were in the possession of this defendant, and were held in absolute ownership, with the fraudulent purpose of aiding the pretended claim now set up by obtaining the possession thereof, rented to one George Henry Simms said squares, and induced him to build a small wooden house thereon; and that upon the discovery of said trespass by this defendant early in October, 1865, he proceeded to eject said pretended tenant and remove said house; but that, having ascertained that said tenant had acted innocently, this defendant suffered him to remain on said premises, he becoming the tenant of this defendant at a nominal rent.

The foregoing machinations on the part of the complainant induce the said allegation that the increase of the value of said squares after a depression almost to the point of worthlessness, has held out a temptation too strong to be resisted by the honesty of the complainant.

This defendant further shows that said squares of ground have never been improved to any extent except by the small houses built by said Simms at the time and under the circumstances above mentioned, and that save to the extent of the nominal rent yielded by the lease to said Simms, the said squares have been wholly without benefit to this defendant, except in the rise in the value thereof.

And further answering said bill, this defendant denies that in the month of July, 1857, or at any time, the complainant borrowed from this defendant the sum of $1,500 for sixty days, at the alleged rate of 3¾ per cent. per month, or any usurious rate, or that this defendant required or received interest at said rate, or any usurious rate, or that at the expiration of said sixty days the complainant applied to this defendant for an extension of time for another sixty days in consideration of the alleged usury and security, or for any consideration, or that this defendant agreed to give said extension, or to make an additional loan of $500 upon the payment of an additional bond at the same rate of 3¾ per cent. per month, or at any rate, or that this defendant agreed to make an additional loan of $500, or any sum, at the alleged rate, or at any rate whatsoever upon the execution of a further instrument of writing of similar tenor and effect, to the aforesaid deed, or otherwise, or that this

defendant represents that alleged or any instrument of writing was rendered necessary by the alleged or any further advance of money, or that the relations of this defendant and the complainant would continue unchanged to those of lender and borrower, or that said deed and further instrument were and should continue only security for the repayment of the alleged loans of $1,500
9 and $500, or any loans, or except as such security should have none other operation and effect, or that at any time any further instrument or instruments of writing were mentioned or directly or indirectly referred to, save only for the purpose of carrying fully into execution the contract of sale hereinbefore fully set forth, or that the said covenant and receipt, copies whereof are filed herewith, were, or either of them was, intended, by either this defendant or the complainant, to have any other operation or effect whatsoever, save only to secure and protect this defendant as the absolute purchaser and owner of said squares of ground, rid and discharge forever of and from all estate, interest, or demand whatsoever, on the part of complainant.

Further answering, this defendant says that he denies that he ever had any consultation with said Ward in reference to said additional loan of $500, or any additional loan whatever, or in reference to any further instrument or instruments of writing, save only to carry into effect said contract of sale, as above stated. This defendant does not know what passed between the complainant and said Ward, or whether the alleged inquiries, or any of them, were made of the latter, or what answer or opinions were by said Ward expressed in reply to said inquiries, but this defendant is informed and believes that the allegations in the bill in this regard are but a tissue of falsehoods, and he calls for proof of the same, if pertinent to the complainant's case, and he denies that said responses or opinions, or any of them, were made or given with the knowledge or approval or by the consent or authority of this defendant.

This defendant further denies that subsequently to the execution of said covenant and payment of $500 and receipt, as hereinbefore set forth, he "dunned" the complainant, as alleged, or ever demanded payment of either said $1,500 or $500, or any part thereof or any interest thereon, or that he otherwise in any respect whatsoever treated or regarded the transaction carried into effect by said covenant, payment, and receipt, in any respect as other than an absolute purchase as aforesaid, or that the complainant ever called upon this defendant to pay the alleged interest, or any interest whatever, or that this defendant ever received the alleged interest, or any interest whatsoever, or that the complainant ever, to the knowledge of this defendant, or so far as he is informed, treated said transaction or professed to regard the same as other in any respect than an absolute purchase on the part of this defendant, save only in the fraudulent and clandestine machinations as above mentioned, until shortly before the filing of the bill.

And this defendant denies all and every claim of right of the complainant set forth in the said bill in and to the said squares of ground, or any interest of the complainant at law or in equity there-

in, without this, that there is any other matter or thing in the said bill contained material or necessary for this defendant to make answer and not herein sufficiently answered, confessed, or traversed and avoided or denied is true to the knowledge or belief of this defendant; all of which this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and prays hence to be dismissed with his reasonable costs in this behalf most wrongfully sustained.

H. S. DAVIS.

WALTER D. DAVIDGE,
JOHN E. NORRIS,
Solicitors for Def't.

10 CITY OF WASHINGTON, } ss:
District of Columbia, }

On this 14th day of August, 1869, before me, clerk of the supreme court of the District of Columbia, personally appeared the defendant, Henry S. Davis, whose name is subscribed to the foregoing answer, and made oath that he has read said answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information and belief, and as to those matters that he believes it to be true.

H. S. DAVIS.

Subscribed and sworn to before me, this 14th of August, 1869.
R. J. MEIGS, *Clerk.*

H. S. D.—EXHIBIT No. 1.—*Filed August* 14, 1869.

Whereas the undersigned, Samuel A. Peugh, of the city of Washington, in the District of Columbia, having heretofore sold and conveyed to Henry S. Davis, of the said city, two certain squares of ground in said city, the same being squares numbered nine hundred and ten (910) and nine hundred and eleven (911), in the said city, said sale and conveyance having been by the said Peugh made with the full assurance and promise of a good and indefeasible title in fee simple, though the said conveyance contains only a special warranty, the said conveyance to said Davis bearing date on the fourth day of March, A. D. 1857, and being recorded on the seventh day of September, A. D. 1857;

And whereas the title to the said squares so conveyed as aforesaid to said Davis having been now questioned and disputed, the said Peugh doth now, for himself, his heirs, executors, and administrators, promise, covenant, and agree to and with the said Henry S. Davis, his heirs and assigns, in the manner following—that is, that he, the said Samuel A. Peugh, and his heirs shall and will warrant and forever defend the said squares of ground and appurtenances as conveyed as aforesaid unto the said Henry S. Davis, his heirs and assigns, from and against the claim or claims of all persons whomsoever:

And, further, that the said Peugh and his heirs, executors, and

administrators shall and will pay and refund to said Davis, his heirs or assigns, all and singular the loss, cost, damage, and expenses, including the consideration in said deed or conveyance which or to which the said Davis, his heirs or assigns, shall loose, incur, pay, or be subject to by reason of any claim or litigation against or on account of said squares of ground, or either of them.

And for the full and faithful observance and performance of all the covenants and agreements aforesaid, and for the payment of all the sum or sums of money as therein provided, in the manner prescribed as aforesaid, the said Samuel A. Peugh doth hereby bind himself, his heirs, executors, and administrators, and each and every of them, firmly by these presents.

In testimony whereof, the said Samuel A. Peugh doth herein so set his hand and seal, on this ninth day of February, in the year of our Lord one thousand eight hundred and fifty-eight.

S. A. PEUGH. [SEAL.]

Signed, sealed, and delivered in the presence of—
FRANCIS MOHUN.
WM. H. WARD.

11 WASHINGTON, D. C., *February 9th*, 1858.

Received of Henry S. Davis two thousand dollars, the same being in full for the purchase of squares Nos. 910 and 911, in the city of Washington.

$2,000. S. A. PEUGH.

* * * * * * *

170 UNITED STATES OF AMERICA:

The President of the United States of America to the honorable the judges of the supreme court of the District of Columbia, Greeting:

Whereas lately in the supreme court of the District of Columbia, before you in a case between Samuel A. Peugh, complainant, and Henry S. Davis, defendant, wherein the decree of the said supreme court entered in said cause on the 6th day of March, 1875, in the following words, viz:

"This cause having been heard at a previous day of this term on the record of the special term in equity, and upon argument of counsel on both sides, whereupon, on consideration of the whole matter, it is ordered, adjudged, & decreed that the decree of the special term of September 28, 1874, from which the appeal to this court was prosecuted, be, and the same is hereby, affirmed with costs:" as by the inspection of the transcript of the record of said Supreme Court of the U. S., by virtue of an appeal agreeably to the act of Congress in such cases as made and provided fully and at large will appear.

And whereas, in the present term of October, in the year of
171 our Lord one thousand eight hundred and seventy-seven, the said cause came on to be heard before the said supreme court on the transcript of record, and was argued by counsel, on consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this case be,

and the same is hereby, reversed with costs, and that the said complainant recover against the said defendant, Henry S. Davis, for his costs herein expended, and have execution therefor. And it is further ordered that this cause be, and the same is hereby, remanded to the said supreme court for further proceedings to be had therein in conformity with the opinion of this court, 15th April, 1878.

You, therefore, are hereby commanded that execution and further proceedings be had in said cause in conformity with the opinion and decree of this court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, the twenty-eighth day of August, in the year of our Lord one thousand eight hundred & seventy-eight.

Costs of complainant, 8—, paid by attorney for defendant.

Taxed by— D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Filed October 7, 1878.
R. J. MEIGS.

172 SAMUEL A. PEUGH, Complainant, *vs.* HENRY S. DAVIS, Defendant. } No. 1713. Equity.

Upon application of counsel for the complainant, it is ordered by the court this 23d day of November, A. D. 1878, that this cause be referred to the auditor of this court to state an account therein between the parties in accordance with the decree of the Supreme Court of the United States in the premises and the mandate of that court.

By the court: MACARTHUR, *Justice.*

Filed November 23d, 1878.

173 In the Supreme Court of the District of Columbia.

SAMUEL A. PEUGH *vs.* HENRY S. DAVIS. } No. 1713. Equity Docket No. 9.

To the honorable the supreme court of the District of Columbia:

On the 23d day of November, 1878, the order following was made by your honorable court:

"That this case be referred to the auditor of this court to state an account therein between the parties, in accordance with the decree of the Supreme Court of the United States in the premises and the mandate of that court."

The opinion of the Supreme Court of the United States, to which further proceedings in this honorable court are to conform, asserts that complainant has a right to redeem the property referred to in this litigation from the mortgage, and directs that "in estimating the amount due upon the loan, interest only at the rate of six p. ct.

per annum be allowed:" that "the defendant be charged with a reasonable sum for the use and occupation of the premises from the time he took possession in 1865, and allowed for taxes paid, and other necessary expenses," &c., &c.

173½ Your auditor most respectively reports—

That he caused due notice to be served on the counsel for the parties, respectively, to appear before him for the purposes indicated by the order of reference herein, at 11 o'clock a. m., of the 16 day of December, 1878; that hearings were had for the taking of testimony on the 19 and 30th days of December, 1878; the 6th, 13th, 17th, 25th, & 31st day of January, 1879; the 5th, 7th, 11th, 24th, 26th, and 28th days of February, 1879; the 3rd, 5th, 6th, 8th, 10th, 12th, 13th, 14th, 17th, 19th, 22nd, 25th, 26th, 28, and 29th days of March, 1879; the 2nd, 9th, 10th, 12th, and 17 days of April, 1879, and the 15th of May, 1879, all of which testimony is hereunto appended.

In addition thereto the parties, respectively, filed with the auditor a statement of their claims; that on behalf of complainant is marked Exhibit "A," "S. A. P;" and on behalf of defendant those marked Exhibits "A," "H. S. Davis;" Exhibit "B," "H. S. Davis;" Exhibits "C," "H. S. Davis;" Exhibit "D," "H. S. Davis," and Exhibit "E," "H. S. Davis," all of which are also appended.

It will be seen that the claim of complainant, as per exhibit marked "A," "S. A. P.," consists of money paid the defendant in
174 July and September, 1857, and interest thereon, for defendant's use and occupation of squares 910 and 911, in the city of Washington, from November 1st, 1865, to April 15, 1878, inclusive, charging ten per cent. upon the assessed valuation of said squares of ground during the several years included, and 6 p. ct. interest upon each year's rental to January 1st, 1879.

See items of said exhibit 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15; item 16 is for rent of said squares of ground collected by defendant from the United States, for occupation thereof by the military from Sept. 1st, 1861, to Oct. 31st, 1865, and for the fencing around the same, destroyed by the military, as per Treasury warrants or drafts therefor, paid May 5, 1875, $1,266.82, and interest thereon (see note); item 17, professional services in prosecuting to successful results claim before Congress for $5,000, as per voucher "A," $500, and interest thereon; item 18, various costs and for fee paid to officers and others by complainant in and about the prosecution of this suit.

Defendant claims, as per his account marked Exhibit "A," "H. S. Davis," for money by him paid taxes on said squares of ground from
1858 to 1878, inclusive, amounting to $2,932.06, and interest.
175 Exhibit "B," "H. S. Davis" amount paid by defendant, water tax on said squares, amounting to $935.25, and interest. Exhibit "C," "H. S. Davis," money paid for recording deed; money paid Caroline for S. A. Peugh; taxes 1857 (redemption), paving tax, 1858, redemption 1859. Exhs. (F & G), lawyers' fee, Wiltberger, marshal's fee, 1875, drainage sq. 911, with interest on the several items.

Exhibit "D," "H. S. Davis," summary of defendant's claims against

complainant, amounting to $11,043.94, subject to credits for occupation rent of squares 910 & 911.

Exhibit "E," "H. S. Davis," defendant's supplemental account for in the Wiltberger case, and int. Services in prosecuting claim against Government and int., and services for prompt payment of taxes, and general care of property for twenty years.

The reference herein is for the purpose of stating a special mortgage account upon the theory of the decision of the Supreme Court of the United States, to ascertain the amount due upon the loan of money made by defendant to complainant, computing interest thereon at six per cent. per annum, and charging the defendant with a reasonable sum for the use and occupation of these two squares of ground from the time he assumed possession in the year 1865,
176 allowing defendant for taxes paid, and other necessary expenses.

It appears these two squares of ground have been inclosed since some time in the year 1861, the fencing having been removed while in the occupancy of the United States for military purposes. It also appears that a tenant house was erected on square 911, in the year 1865, by one George Sims, who removed the same in the year 1866, since which time said squares have remained unoccupied.

It further appears that defendant took actual possession of said squares some time in the year 1865, claiming their absolute ownership, and continued his possession until his rights thereto was rejected by the decree of the Supreme Court of the U. S., rendered at the October term, 1877, and, among other things, directing that defendant should be charged "a reasonable sum for the use and occupation of the premises from the time he took possession in 1865."

I have had much trouble and perplexity in determining the data upon which to predicate the computation of reasonable occupation rent with which the decree of the Supreme Court directs the
177 defendant should be charged. The case presents much of hardship to both parties. The complainant, by the mistake or wrongful act of the defendant, was dispossessed of valuable property for a period of some twelve years, during which time the surrounding property found ready market at greatly advanced prices. While the adverse possession and claim of ownership of this property by defendant absolutely prevented complainant from in any way or manner handling his property during this favorable opportunity, which, if not now lost to complainant, is surely delayed, possibly for years to come; while, on the other hand, defendant claimed, and would seem to have good right to believe the legal title to this property was in himself, and defended his possession to the ultimate, paying taxes, and doing all other things consistent with his claim to ownership. True he done (did?) nothing to utilize the property, and thus furnish us some reliable data as to its capabilities when judiciously occupied and used. He testifies he never made any effort to rent or lease this property; so then, in the absence of more conclusive testimony, I am compelled to glean from that before me, made up from the opinions of witnesses as to the rental value of this property as appears by their testimony. In doing this I have had

178 regard to witnesses' knowledge of this particular locality and property, as well as their knowledge generally of property in the city of Washington, their experience in handling this class of property, as well as witnesses' seeming opportunity for forming a well advised judgment. From all of which I have concluded that six per ct. interest (and general taxes) on the assessed valuation of this property for the time covered by defendant's occupancy is as reasonable as any data of which the case as made is susceptible.

Schedules hereto attached will show the result as to this item (occupation rent), computed upon the data stated.

Items 1 and 2 of complainant's ac't, Exhibit "A," "S. A. P.," charges for money paid defendant on account of interest on loan, on July 6th and September 6, 1857, with interest thereon, are allowed.

Item 16 of same account and exhibit, being money collected as rent by defendant from the Government for the use of these squares of ground by the military, is allowed.

The several specifications of item 18 of complainant's acc't and exhibit are allowed, all of which are particularly stated in the schedule thereto.

Items 17 and 19 of complainant's ac. and exhibit are disallowed.

179 In addition to complainant's ac., as stated in Exhibit "A," "S. A. P.," he files with the auditor a certified statement of "special improvement taxes" assessed against the several lots in squares 910 and 911, for the years 1875, 1876, and 1877; also like assessments for "water taxes," for the years 1878 and 1879, all of which complainant claims should be charged to defendant in this audit. This claim I disallow.

All the papers relating to it I herewith append.

In considering the claims of defendant I have allowed him the money loaned complainant on May 6, 1857, and Feb'y, 1858. For all taxes paid by him on said squares, of any nature, as charged in Exhibit "A," "B," and "C," "H. S. Davis," except as modified by the testimony of John F. Cook, collector. I have also allowed amount paid for drainage of square 911, as per voucher attached to Exhibit "C." I disallow the several items of Exhibit "C," viz:

Recording deed	1 25
To Caroline, for S. A. Peugh	100 00
Lawyers' fees, Wiltberger	130 00
Marshall's fees	3 50

And also disallow all the items or charges stated in de-
180 fendant's supplemental account, marked Exhibit "E," Henry S. Davis, filed herein March 14, 1879.

Referring to page 105, printed case, defendant Davis, testifying as — what occurred in 1865 in regard to this property, says: That "Mr. Peugh then proposed to pay me one per cent. for the time I had had the money, on all the expenses I had paid out, particularly the taxes, redemptions from tax sales, and all," which proposal defendant says "I declined." The foregoing statement defendant substantially reiterated in his cross-examination—see printed case, page

119—and which is claimed is an admission of the "tender," as charged in complainant's "original bill" herein.

That by said "tender" it is insisted interest on the original loan, and all expenditures made by defendant prior thereto for or on account of said two squares of ground, should then cease.

I have prepared and append thereto two schedules, marked "A" and "B," in each of which the entire account is stated, as per my several findings or conclusions hereinbefore indicated, with this difference: Schedule "A" suspends the allowance of interest to
180½ defendant on his original debt & expenditures for or on account of this property at November 1st, 1865, which is about the date of the "tender."

Schedule "B" credits defendant with interest until his entire debt & interest is absorbed by allowances made to complainant. Each item allowed to the parties respectively, with interest thereon, is specified in the schedules.

All of which is respectively submitted.

(Signed) THOMAS HOOD,
Sp'l Auditor.

Washington, D. C., Dec. 1st, 1879.

NOTE.—Complainants' Exhibit "A" and Defendant's Exhibit "A" will be found with the files herein.

(Signed) T. H.

* * * * * * * *

204 SAMUEL A. PEUGH
vs.
HENRY S. DAVIS. } No. 1713. Equity Doc. 9.

On reference to auditor. Notices served on counsel for the respective parties to appear before the auditor on Dec. 16, 1878—11 o'clock a. m.

By request of Mr. Norris, sol'r for def't Davis, hearing postponed to Thursday, Dec. 19, 1878—11 o'clock a. m.

THURSDAY, *Dec.* 19, 1878—11 o'clock a. m.

Present: Mr. *Morris*, sol. for compl't.

HENRY A. WILLARD, called on behalf of complainant, and sworn:

Q. Do you know squares 910 & 911 in the city of Washington?

A. I know the neighborhood; I own square adjacent to it.

Q. When did you purchase that square, and what did you pay for it?

A. I purchased it some two years & one-half ago, and paid for it 16c. per ft.

Q. What do you consider a fair price for the land in that vicinity at the time, or at any time within the last twelve or fifteen years?

A. I consider land in that vicinity worth the price I paid for that I purchased, say 2½ years ago, and I think it of that value now. I was not acquainted with the value of lands in that vicinity 12 or 15 years ago.

Q. How do you regard squares 910 & 911 in point of value as compared with square 932, which you own?

A. I should consider 910 of the same value as 932; 911 being one block nearer the street railroad I should consider it worth more.

H. W. WILLARD.

Subscribed and sworn to before me Dec. 19, 1878.

THOMAS HOOD, *Auditor.*

205 MOSES KELLY, called on behalf of complainant and sworn:

Q. Are you acquainted with squares 910 & 911 in this city; if so, how long?

A. I am, and have been particularly so for the last five or six years.

Q. What do you consider a fair price for said property since the time you have known it?

A. The fluctuation in the value during the time referred to has been very considerable; I should say it would range from 15 to 25c. per ft. in value.

Q. Which square do you consider the most valuable, and state how they differ in value, if at all.

A. I think 911 the more valuable; there is a street railroad located on one front of it. I think it worth about ten cents per foot more than square 910.

Q. Were you ever in negociation for the purchase of this property, or did you contemplate such purchase; and, if so, when, which part, and how much were you willing to pay for it at that time?

A. Several years ago, possibly five or six, I was desirous of pur-[chasing] square 911, but was told that no proposition for its purchase could then be entertained for it. I would have been willing at that time to pay 25c. per square foot for it.

Q. I believe you are quite familiar with the value of real estate throughout this city, and have dealt largely in it; is not this so?

A. It is so as regards certain portions of the city. I refer to the northern and eastern portions.

MOSES KELLY.

Subscribed and sworn to before me this Dec. 19, 1878.

THOMAS HOOD, *Auditor.*

206 F. C. CATE, called on behalf of complainant and sworn:

I reside in this city, on 8th St. N. E., bet. H & I Sts., adjacent to squares 910 & 911. I am in Government employ.

Q. What do you know of the value of real estate in that vicinity within the past five years?

A. The value of real estate has greatly varied within that time in the neighborhood referred to. I should say as much as from ten to fifteen cents per foot.

Q. What, in your opinion, is the value of squares 910 & 911, or either of them, during the time of your acquaintance with that property?

A. Square 910, I should say, would range from 23c. to 14 & 15c. per foot. Square 911, from 16 to 25c. per ft.

Q. Do I understand the prices you mention would be for the squares entire or for single lots in those squares?

A. For the squares entire, embracing alleys and all. If sold in single lots I think they would have been worth nearly or quite double the value stated.

F. C. CATE.

Subscribed & sworn to before me, this Dec. 19, 1878.

THOMAS HOOD, *Auditor.*

Further hearing adjourned to Dec. 30th, 1878, 11 o'clock.

THOMAS HOOD, *Auditor.*

Hearing adjourned to Jan'y 6, 1879, 11 o'clock a. m.

THOMAS HOOD, *Auditor.*

JAN'Y 6TH—11 o'clock a. m.

Present: S. A. Peugh, complainant; Mr. Norris, sol'r of def't Davis.

Mr. Peugh offers the opinion of Justice Field, of the Supreme Court of the United States, in the above-entitled cause, filed and marked Exhibit S. A. P., No. 1.

Mr. Norris, on behalf of def't Davis, files herein the following as exhibits:

207 Account of H. S. Davis, marked Exhibit A.

Account of H. S. Davis, marked Exhibit B.

Account of H. S. Davis, marked Exhibit C.

Summary of the foregoing ac. of H. S. Davis, marked Exhibit D.

Further hearing adjourned to Jan'y 13th, 1879, 11 o'clock, by agreement.

THOMAS HOOD, *Auditor.*

JANUARY 13TH, 1879.

Parties met for hearing pursuant to adjournment, and at the suggestion of Mr. Norris, counsel for def't, an adjournment was had by consent to Friday, Jan'y 17th, 1879.

THOMAS HOOD, *Auditor.*

JANUARY 17TH.

Parties met and adjourned to Wednesday, Jan'y 22, '79.

THOMAS HOOD, *Auditor.*

JANUARY 22D, 1879.

Parties [met] pursuant to adjournment, when, by request of Mr. Norris, counsel, hearing was adjourned to Saturday, Jan'y 25, '79, at 11 o'clock a. m.

THOMAS HOOD, *Auditor.*

JANUARY 25TH, 1879, *Saturday*—11 a. m.

Present: S. A. Peugh, compl't, and Mr. Norris, for def't Davis.

MOSES KELLY recalled on behalf of complainant.

Def't's counsel objects to any further testimony being taken until the complainant files his ac. herein, and suggests to the auditor that the taking of testimony should be deferred until said account is filed with the auditor.

Adjourned to Friday, Jan'y 31st, 1879, 11 o'clock a. m., comp't Peugh to file his account at the time indicated.

THOMAS HOOD, *Auditor.*

JANUARY 31, 1879—11 o'clock a. m.

Present: Mr. Morris, for compl't; Mr. Norris for def't Davis.

Mr. Peugh, complainant, filed his ac. and vouchers, No. 1 to 5;
208 also Voucher "A;" also Treasury transcript marked Voucher "B," and supplement.

JOHN C. MCKELDEN, called on behalf of complainant (sworn): I have frequently noticed the property in this city known as squares 910 & 911. I owned one lot in that vicinity some years ago; it was unimproved.

Q. What is your opinion was the value of squares 910 & 911 during the past fifteen years, or as long as you have known the property?

Objection to question.

A. I have not been acquainted with that section of the city until the building of the Columbia railway in 1872; I think in 1872 & 1873; in my judgment those squares could have been sold on an average of 10 to 12 cts. p'r foot.

Q. Can you state what in the last 15 years, or as long as you are willing to answer to, has been a fair rental value for property in the city of Washington; I mean what percentage in proportion to the assessed valuation?

Objected to, for the following reasons: 1st, that the question does not designate whether improved or unimproved; 2d, that it relates to property in general, and does not confine itself to any locality; and, 3d, that rent and use and occupation are different terms, and settled on different conditions.

A. My experience when property has been properly improved the rental has usually been about ten per cent. upon the value on an average; I have had no experience in regard to the renting of unimproved property.

Q. If squares 910 & 911 has been properly improved, would the rental value have differed from the average you have mentioned?

Objected to, as purely hypothetical, and not pertaining to any matter now under inquiry.

A. I have had no experience whatever in renting houses in that

section of the city; consequently my answer is mere opinion, as
209 follows: If small houses had been erected on those two squares, say, in the years 1872 & 1873, they would no doubt have paid perhaps ten per cent. on the cost, but for the last few years I fear they would not, rents having fallen so very heavily.

Cross-ex.:

Q. In your estimate at from 10 to 12 cts. per square foot on those squares, would you not make a distinction between the square lying between H & I and I and K Sts., and, if so, what would be the difference?

A. I should certainly estimate the square building on H St. as greater than the square north of it; I would think from three to four cents per foot.

Q. Do you know of any unimproved property in that section of the city that would realize on the assessed value a rental of ten per cent., or even of three per cent., within the last ten years?

A. I have already stated I have had no experience whatever in regard to such property, but if I did own such property and had an application to rent it for a short period of a year or two, I should not expect to obtain over three or four per cent. on its value.

Re-ex.:

Q. If you had an application for a long lease, say, of 99 years, renewable forever, what percentage would you have expected?

A. I should have expected six per cent. clear on the value agreed upon.

Q. When you said 10 or 12 cents per foot for the value of the squares, did you not mean the average value of both?

Objected to, as not responsive to anything elicited on cross-examination, and as contradictory of complainant's own witness.

A. I did.

J. C. McKELDEN.

Subscribed and sworn to before me, this Jan'y 31, 1879.

THOMAS HOOD, *Auditor.*

210 MOSES KELLY, recalled on behalf of complainant:

Q. Have you not been interested in the purchase of ground and erection of houses in the immediate vicinity of squares 910 & 911 in this city?

Objected to, for the reason that it is leading; and, secondly, because there is no time mentioned where the purchase of ground and the erection of houses took place.

A. I have been interested in the purchase of ground and the erection of houses in that vicinity for the last 7 or 8 years, probably.

Q. At what percentage, during that time, could these two squares of ground have been placed upon long lease with the privilege of purchase, and what percentage, if any, upon the assessed or ap-

praised value would you have been willing to give for them, and both, as to the value of the gross and the nett percentage?

Objected to, for the reasons:

1st. That the question is hypothetical, and the inquiry under the decree of the court is confined to use & occupation in the past.

2d. That the question of value under a long lease conferring benefits and advantages to the lessee is not a matter for consideration in this inquiry.

3d. It is immaterial what the witness might have given, and only a matter of what the market value might be.

The witness says, in answering that question, I should like to know what the assessments have been, and thereupon complainant shows him Exhibit A, filed by def't in this case.

A. I would have been willing myself to have leased these two squares, as suggested in the question (with the privilege of purchase), and to have paid not less than six per cent. upon the valuations represented in this paper (Def't's Ex. A), in addition to taxes and assessments for street improvements; I think I could have placed them at that rate.

211 Q. Do you know the ordinary or average rental value of improved real estate in that section of the city? If so, please state it.

Objected to, as irrelevant and immaterial.

A. I do not.

MOSES KELLY.

Subscribed and sworn to before me, Jan'y 31, 1879.

THOMAS HOOD, *Auditor.*

JESSIE B. WILSON, called on behalf of compl't and sworn:

Q. Are you familiar with the value of real estate in the city of Washington?

A. I have a limited knowledge of the value of real estate in the city of Washington; I own real estate in the city.

Q. State, if you know, what the ordinary or average rental value of real estate in this city, improved or unimproved, is now, or has been for the last 13 or 14 years, and state the percentage, both gross and nett, in proportion to the assessed and market value, as near as you can.

Objected to, for the reason that it refers to property generally in the city of Washington, and does not relate to the rental value or use and occupation of the property in question.

A. I shall have to confine my answer to my own property; my improved property netts me all of six per cent. on the purchase price; on the assessed valuation the percentage would be larger; my unimproved property yields me no percentage. I believe I could sell my unimproved real estate on the cost at six per cent. int. advanced from the time I purchased—I mean, on an average.

So much of the answer of witness as relates to the price at which he could sell his unimproved property for, is objected to.

Cross-ex.:

Q. Have you any knowledge as to the property in question, squares 910 & 911?

212 A. I know but little of this property.

Q. State how your improved and unimproved property is situated as to the business operations of the city, or otherwise.

A. My property, with the exception of two small parcels of unimproved property, is very advantageously situated.

J. B. WILSON.

Subscribed and sworn to before me, Jan'y 31, 1879.

THOMAS HOOD, *Auditor.*

Further hearing adjourned to Wednesday, Feb. 5th, 1879, 11 o'clock a. m.

THOMAS HOOD, *Auditor*

WEDNESDAY, *Feb. 5th*, 1879—11 o'clock a. m.

Present: S. A. Peugh, compl't; J. E. Norris, sol. for def't Davis.

LORING P. CHAPPEL, called on behalf of compl't and sworn:

I reside at 628 I street N. E., city.

Q. Have you or have you not been engaged considerably in the purchase and sale of real estate in the city; and, if so, to what part of the city have your purchases & sales been mostly confined?

A. I have been engaged to a considerable extent in the purchase and sale of real estate in the N. E. part of the city.

Q. Do you know the location of squares 910 & 911, extending from H to K Sts., and 8th to 9th east, and have you dealt in ground in their vicinity?

A. I know them well, and have dealt in ground in their immediate vicinity.

Q. Is it or is it not your opinion that these squares could have been placed on an annual ground rent on a long lease, say, 99 years, with the privilege of purchase at the several city assessments, in 1865, $5,338; in 1869, $8,665; in 1873, $17,408; in 1876, $22,939, at six per cent., clear of taxes?

Question objected to, first, that it is leading; secondly, that the question of the value of a long lease for 99 years, or any lease, is not submitted by the order of the court herein for the consideration of the auditor, but only the question for the use of such reasonable sum

213 as should appear; and, further, that the question goes upon the assumption that it was the duty of the defendant to realize the greatest possible sum from said squares when the title to the same was in litigation.

A. Witness asks, what is the meaning of the words, "with the privilege of purchase" in the question?

Complainant explains, it is simply the privilege of purchase within one day or one year, or any time within the covered lease. Witness answers: These squares could, in his opinion, have been so leased at the periods of time named.

Counsel for def't objects to the answer for the reason the witness does not name the particular assessments, or the period at which they were made, nor whether there would have been any difference in the rental value.

Q. Could you or could you not have handled those squares to a profit of six per cent. clear upon the aggregate of city assessments from 1865 up to 1876, or within the last ten or twelve years?

Question objected to: 1st, as leading; 2d, that it is restricted to what the witness could have done, and has no connection with the general value of the premises for use and occupation.

A. My knowledge of real estate in that vicinity commenced in the year 1872; I can answer nothing previous to that time; I have no doubt that I, or others, could have handled at any time between 1872 and the present with a good profit by paying six per cent. upon the highest assessments mentioned.

Answer objected to, so far as it includes "others," as not responsive to the question, and for the reasons stated in the objections to the question.

Q. Do you, in saying six per cent., mean six per cent. nett or six per cent. gross?

Witness asks, How I am to understand that question—nett & gross? Complainant explains: My meaning, when I say six per cent. nett, is clear of taxes.

A. I mean nett.

Cross-ex.:

Q. To what extent have you dealt in real estate, buying and selling near these squares?

214 A. Individually and in connection with other members of a company of which I was a member, to the extent of one hundred thousand dollars, or over.

Q. What is the name of the — you refer to, and what were its objects?

A. The name of the company was Cate, Kelly & Chappel; its objects were the purchasing & improving and selling real estate; also of renting real estate.

Q. Is that company still in existence, or has it been dissolved?

Objected to as irrelevant.

A. There has been no formal or legal dissolution of this company; the business of the company has been discontinued, or rather we are not at present doing business as a company.

Q. What is the cause of the company discontinuing business?

Objected to, as irrelevant, nor is it responsive to the examiner-in-chief.

A. All the lands that the company purchased we have sold.

Q. Have you had an estimate made of the company's profits and losses, and, if so, what was your net gain?

Same objection.

A. We have had no aggregate estimate.

Q. Is it not a fact that your company was unsuccessful, and that owing to the depreciation in the value of real estate your business was a failure?

Same objection.

A. I cannot answer that question unless it is added to, as other matters entered into our business operations that had their influence upon them, so that I cannot say that our business proper was a failure.

Q. Do you not know enough to satisfy you that the speculation of your company resulted in loss?

A. I cannot tell; if I had had the entire handling of it I could answer more advisedly; I can say it was a loss to me individually.

Q. Do you not know that since Sept., 1873, all real estate in this city, improved or unimproved, except in the thrifty business portions, have depreciated in value?

A. So far as my knowledge extends it has.

215 Q. Do you think that unimproved property in the section you speak of, that is, near squares 910 & 911, could at any time have been rented so as to realize six per cent., or even four per cent., after paying taxes, assessments, and interest upon the value?

A. Upon a long lease, yes; upon a short lease, no.

Q. By a long lease what do you mean?

A. I mean by a long lease a length of time sufficient for the lessee to improve the property and make his improvement available.

Q. Don't you also mean, as you state in your examination-in-chief, a lease with the privilege of purchasing?

A. I did not include that in an estimate as low as four per cent.

Q. If there was a mortgage upon the squares of ground which was liable to be foreclosed by the mortgage, what is your opinion as to the rental value either in a short or long lease in that case?

Objected to, as irrelevant. 1st, the def't denying the existence of a mortgage pending the time to which the question relates, but claimed absolute title.

A. If there was a mortgage liable to be foreclosed, it would in my opinion make a difference; it would depreciate it.

Q. If the property that you spoke of, 910 & 911, were in litigation, or the question of title between the parties litigant was in dispute, how would that effect the value of a lease?

Objected to, as irrelevant.

A. I think it would depreciate it.

Q. Did you or the company which you have named at any time within the past five years make offers to Mr. Davis or to Mr. Peugh for the purchase of the lease of squares 910 & 911, or either of them, or any part?

A. I do not know that any of our firm did; I know Mr. Cate and I talked about [it] between ourselves.

Redirect:

Q. Mr. Norris (Morris?) asks you in regard to your experience in real estate transactions adjacent to squares 910 & 911, whether you made a profit or loss in your real estate transactions; from
216 your experience could you not have taken those squares at their *at their* assessed valuation and made a profit from them?

A. I answer, Yes, sir; I think I could; I mean purchased them.

Q. You have been asked, on cross-examination, if the title to those squares were in dispute or prejudicially affected by liens upon them, and would they not have been reduced in their disposable value. Suppose the title had been free from dispute, would such depreciation have existed or the rental or saleable value unfavorably affected?

A. I think the disposable value of the property in any way would be unfavorably affected by litigation.

LORING CHAPPEL.

Subscribed and sworn to before me, this Feb'y 5, 1879.

THOMAS HOOD, *Auditor.*

Farther hearing adjourned to Friday, Feb'y 7th, 1879, 11 o'clock a. m.

THOMAS HOOD, *Auditor.*

FRIDAY, *Feb'y 7th*, 1879—11 o'clock a. m.

Present: S. A. Peugh, compl't; J. E. Norris, sol'r for def't Davis.

F. C. CATE recalled by compl't:

Q. Have you not been interested in the purchase of ground and erection of houses in the immediate vicinity of squares 910 & 911 in this city?

Objected to, as leading, and there is no time mentioned when the purchase of ground and the erection of houses took place.

A. I have for the past 8 or 10 years.

Q. At what percentage during that time could these two squares of ground have been placed upon long lease with the privilege of purchase, and what; at what percentage, if any, upon the assessed or appraised value would you have been willing to give for them or both, as to the value of the gross or the nett percentage?

Objected to for the reasons—

1st. That the question is hypothetical, and the inquiry under the decree of the court is confined to use & occupation in the past.

2d. That the question of value under a long lease confer-ing benefits and advantages to the lessee is not a matter of consideration in this inquiry.

3d. It is immaterial what the witness might have given, and only a matter of what the market value might be.

217 A. I would have been willing to give at least six per cent. nett over and above all expenses, and I have no doubt but that square 911 could have been placed on long lease at a higher rate percentage on the assessed valuation.

The answer objected to, for the reasons stated to the question.

Q. Do you know the ordinary or average rental value of improved real estate in that section of the city? And, if so please state it.

Objection to, as irrelevant and immaterial.

A. About 10 per cent. upon its cost value.

Q. Would you or would you not, at any time since you have known these squares of ground, have purchased them at their assessed valuation?

Objected to, for the reason it is immaterial what price the witness would have taken the property at; and further, the only question to be considered by the auditor under the decree of the court is what is a reasonable compensation for the use and occupation of the property from the year 1865.

A. I would have been glad to have done so at any time up to within the past two or three years, and only in the time excepted or on account of my inability to make the purchase and payment.

Answer objected to, for the reason stated to the question.

Q. Does or does not the Metropolitan (Columbia?) street railroad run along in front of the square bounded by H & I Sts. and 8th & 9th east.

Objected to, as immaterial.

A. The Columbia St. railroads runs on H St. fronting said square.

Objected to, for same reason.

Q. On the adjoining square, either east, west, or south of said squares, do you know of the sales of any lots of ground within the last eight years, or since you have known them; and what was the highest prices paid for the ground.

Question objected to, as immaterial to the matter referred to the auditor; and further, because the witness is not asked to state the price, but the highest price; and further, the value of property on purchase is not in question.

218 A. I have known lots to have been sold east and west of this square as high as 60c. per foot, within the last 8 years.

Q. What is your occupation, and how long have you been so occupied; if an office- of Government, what office?

A. I have been acting chief of the Organization Division of National Banks in the office of Comptroller of the Currency.

Cross-ex.:

Q. How long have you been in that office?

A. I have been in that office, but not in the capacity stated, 14 years last April.

Q. You belong to a company here, as I learn, consisting of Mr. Kelly, Mr. Chappel, and yourself, engaged in purchasing, improving, and selling real estate; is that so?

A. I would rather the word association would be used for the word company, and I answer yes.

Q. Did you buy and improve and sell or rent any real estate in the neighborhood of squares 910 and 911, and if so, to what extent?

A. We did, to the extent of one hundred thousand dollars or more.

Q. Did you buy squares or lots?

A. Both; principally squares.

Q. Did you purchase or take them on lease.

A. A purchase.

Q. What net profits did you realize on the sales or rents of improved property in that vicinity; by profits, I mean percentage on your investments.

A. At least ten per cent. on unimproved, and about the same on improved.

Q. Is your association still in operation?

A. No, sir.

Q. If your business was so profitable, why did you discontinue it?

Objected to, as assuming a fact, and because it is irrelevant.

A. On account of the stagnation of business within the last two or three years.

219 Q. Now you will please state whether you could, at any time within the last 8 or ten years, rent unimproved property in that locality so as to realize 10 per cent. or six per cent. or four per cent., or any percentage at all?

A. I could have rented square bounded on the south on Columbia St. railroad, I have no doubt, for at least six per cent. of its assessed value.

Q. For what purpose, and when could you have rented it for that price?

A. For the purpose of erecting a carriage manufactory, and this was in the year 1876 and 1877.

Q. Who proposed to erect a carriage manufactory there at that time?

A. It was a man named Isham; he resides in Plattsburg, Clinton county, in the State of New York.

Q. Did he propose to rent it, and for what length of time?

A. He did propose to rent a part or the whole of this square; he did specify the time, but wanted a long time.

Q. You have testified that these squares could have been rented so as to realize 6 per cent. on their assessed value within the last six or eight years; I will ask you to state whether with the knowledge the title was in litigation during that time whether you would have taken a lease at 6 per cent. on the assessed value, or at any percentage, with a view of constructing buildings upon them or of selling lots to others?

A. My answer is, I would not have been willing to have rented them at that price so long as the litigation was pending.

Redirect:

Q. In answer to a question on your cross-ex., you state that you would have been willing to have taken those squares at 6 per cent. on their assessed value; did you mean gross or nett?

A. I answered nett.

Q. You have also stated, in reply to a like question, that you would not have leased those squares pending the legal controversy as to title; was or was not that *that* the only difficulty on the subject?

220 Objected to, for the reason it is an assumption of the question and the witness' answer; that the question asked was hypothetical; that if the s'd squares were in litigation would he have given six per cent. on their assessed value, and his answer is responsive to that question.

A. I think the legal controversy was the only difficulty.

Answer objected to.

Q. Did you or did you not understand the legal controversy referred to as applying to those squares only?

A. I did.

Recross:

Q. Did you make an offer to any persons claiming ownership of these squares to purchase them at their assessed value; and, if so, when and to whom?

A. I never have made a direct offer, in consequence of this litigation; I was prepared to make an offer if the title had been regarded as good.

So much *as* the answer as is not responsive to the question objected [to] by def't's counsel.

Q. When was it you was prepared and what did you do?

A. I think in the year 1873 or 1874 I was prepared to purchase these squares, but upon inquiry I found there could not be a clear title to the property; in the year 1876 or 1877 I was prepared to rent the south square.

Re-ex.:

Q. Did you or did you not make an offer to me on the subject of the rent of the one or both of these squares; and, if so, about what time was that?

Objected, as a matter that should have been given in chief, and not pertaining to the subject referred to the auditor.

A. I have not made any offer, in consequence of the litigation in regard to the title.

F. C. CATE.

221 Subscribed & sworn to before me, Feb'y 7, 1878.
THOMAS HOOD, *Auditor.*

Adjourned to Tuesday, Feb'y 11, 1879, 2 o'clock p. m.
THOMAS HOOD, *Auditor.*

TUESDAY, *Feb'y 11th.*

Parties met, and hearing indefinitely postponed.

MONDAY, *Feb'y 24th.*

Hearing set for Wednesday, Feb'y 26th, 1879, by request of complainant, and notices served by him.

WEDNESDAY, *Feb'y 26th.*

Hearing resumed pursuant to the above notice. Present: Mr. Morris, counsel for comp't; Mr. Norris, for def't; when S. A. PEUGH, the comp't in the cause, being called — a witness in his own behalf and sworn, deposes as follows:

Q. What is your residence and occupation?

A. I reside in Washington, and have done so over 30 years; am an att'y for claims and att'y-at-law.

Q. State whether you have ever had, at any time within the last 15 y'rs, an offer from any person or persons to purchase, lease, or rent from you the property involved in the present suit, or any part of them; and, if you say you had any such offer or offers, please state the time, circumstances, and details therefor, and the person or persons by whom the same were made.

Question objected to by counsel for def't, 1stly, for the reason question is leading in its aspect; and, 2dly, that it has no relevance to the matter submitted by the order of the court for the examination and consideration of the auditor; 3dly, the only question being submitted for inquiry is to ascertain a reasonable sum for the use and occupation by the def't of the property under the circumstances of his position and relation to the said property.

A. I have had offers of purchase, of lease, and rent of the property in question; for sq. 910, I was offered $400 a year for the lease thereof for ten years in 1865, by Wm. Durr (this portion of
222 the answer as to a lease in 1865 objected to, the same being antecedent to the institution of this suit); Durr, in Nov., for the use of a brickyard, and he offered to pay me $400 per annum, and pay the taxes. In regard to sq. 911, I have had various offers for both lease, rent, and purchase; the precise amount of purchase for this sq. was the am't of sq. ft. divided by 4, or 25 cts. per foot. This offer was made by Moses Kelly, ab't 3 years ago. About

the same time, or subsequently, an offer was made me to rent this sqr. at the rental value of 6 per cent. on its then assessed value, by two gentlemen whom I had never seen or known before, for manufacturing purposes. I have had repeated offers to purchase the whole property, but could entertain no proposition of either purchase or rent, because of the claim set up by Mr. Davis for the same. I had rented a portion of sq. 911 to Geo. Simms, though without a stipulated price. The offer made by Mr. Kelly, or the proposal to purchase, was predicated upon the fact that I could give a clear title, free from the title of Mr. Davis. In all the conversations of persons who have spoken of purchase or expressed a desire to do so, I was obliged to decline all propositions, and sometimes even interviews upon the subject, because of the pending suit, which, doubtless, deterred many other propositions, for the fact was generally known in the neighborhood.

(All the answer, commencing at the words "the offer," line one of this page, to the end, is objected to, as not responsive to the question and as immaterial to the matter submitted to the auditor.)

Q. What would be a proper sum for the use and occupation of this property during the last 14 or 15 years?

Objected to, as indefinite.

A. I know of no better criterion than that by the claim set up by Mr. Davis himself to demand of the Gove'nt $600 per an., and prove that demand by two competent witnesses, the late Wm. B. Todd & W. W. Metcalf, when they proved the property worth $600
223 a year from 1861 to 1865, though the Gov't, allowing him a fair criterion of value, 6 per cent. upon the assessed valuation, which was then the criterion of value, and has been ever since, so far as my knowledge goes, upon any and all property taken and used by the Gov't.

Objected to the whole of, as being based upon hearsay testimony; and, second, that it is merely the opinion of the witness; 3ly, that the time spoken — is before the occupation of this property by the def't; his assumed occupation, if it existed, did not exist until the year 1865.

Q. What is your answer, in reference to my last question, from 1865 down to the present year?

Same objection.

A. I have collected rent from the Gov't for the use of property for various persons down to 1870, then being predicated upon the city assessments at 6 per cent. thereon, and the payment of taxes in addition, if my memory serves me rightly.

Ans. objected to, as entirely irrelevant and immaterial.

Q. In reference to the item of $500 for legal services, and also the item of $1,000 for legal expenses, mentioned in your ac. filed in this cause, please state what explanation you have to give.

Objected to, for the reason that both items are irrelevant and not comprised with- the scope, meaning, or intent of the decree of the U. S. S. Court in said cause.

A. In regard to the item of $500 for my professional services—this was an offer made to me by Mr. Davis when he employed me, and which I successfully prosecuted—was a charge *a* in my ac., and claimed as a credit on the am't due on his loan of $2,000. The $1,000—(so much of this answer as given is objected to, for reasons that no such credit is claimed by the compl't by his bill filed in this cause on the $2,000 alleged to have been loaned him, the witness; nor was it claimed as a set-off to my interest on the same in any other way; and, further, that the enquiry does fall within the scope of the matters referred to the auditor)—item claimed in this ac. was sug-
224 guested by eminent counsel as a moderate and proper item of charge.

(Also objected to, for the reason above stated.)

Q. What explanation have you to give of the first two items in your ac. of $12.50 each?

Objected to, as not proper questions of enquiry under said decree and order, and for further reason that the matter in question is not embraced in the pleadings in the cause.

A. These two ch'ks when p'd Mr. Davis as a consideration for the use of the money in the loan involved in this controversy, he required the payment before he would make the loan or extend it.

Adjourned to Friday, Feb'y 28, 1879, at 2 o'clock p. m.

THOMAS HOOD, *Auditor.*

FRIDAY, 28, 1879.

Met pursuant to the above adjournment.

Present: Mr. Morris, counsel for comp't; and Mr. Norris, counsel for def't.

On account of engagements on the part of counsel for comp't, this hearing is postponed to Monday, March 3, 1879, at 2 p. m. Postponed at the suggestion of def't's counsel.

THOMAS HOOD, *Auditor.*

MONDAY, *March* 3, 1879.

Met pursuant to the above adjournment.

Present: Counsel for both the parties, and the witness, Mr. Peugh, compl't; when owing to the indisposition of def't counsel, Mr. Norris, hearing was postponed to Wednesday, March 5th, 1879, at 2 p. m.

THOMAS HOOD, *Auditor.*

WEDNESDAY, *March 5th*, 1879—2 o'clock p. m.

Present: Mr. Norris, counsel for def't; when on account of the absence of Mr. Morris, counsel for compl't, hearing was postponed to Thursday, March 6th, 1879, at 2 p. m.

THOMAS HOOD, *Auditor.*

THURSDAY, *March 6th*, 1879—2 o'clock p. m.

Met pursuant to the above adjournment.

Present: Mr. Morris, counsel for compl't; Mr. Norris, counsel for def't, and the witness, compl't Mr. PEUGH; when the cross-examination of said witness by Mr. NORRIS commenced as follows:

Q. You say you are a member of the bar: what bar?

A. The bar of the city of Washington, and the bar of the supreme court of Maryland—the court of appeals.

Q. When were you admitted as a practitioner in the court of appeals in the State of Maryland?

A. Within the last ten years; the precise time I do not remember.

225 Q. When were you admitted to the bar of the S. C. of the D. of Col. as an att'y?

A. Within the last ten years; the precise time I don't remember; the record will show.

Q. To which of these courts were you first admitted?

A. The former, Maryland.

Q. Were you not admitted upon certificate from the court as an att'y in the S. C. of the D. of Col.?

A. I think I was, upon motion.

Q. Do you recollect upon whose motion you were admitted to the court of appeals for the State of Maryland?

A. I do not now remember, but I think it was Stockett Matthews.

Q. Had you read law with him or did you present any credentials to show that you had read law elsewhere, and that you were recommended as qualified for admission?

A. I did not read law with him, but was recommended as qualified to be admitted to that bar.

Q. By whom were you recommended?

A. By certificate; I was admitted to that bar by certificate from Montgomery Co., and on motion as aforesaid.

Q. Had you been admitted as an att'y in Montgomery Co., and was that certificate an official instrument from that court; that is, the C't of Mont. Co.?

A. I had been, and I supposed it was an official cert.; I received it as such.

Q. Then you were not first admitted in the C't of appeals?

A. I was not.

Q. How is it, then, that you stated that you had been admitted to the C't of Appeals of Md. and of the bar of the S. C. of the D. of Col. and omitted to state that you had been admitted to the C't of Mont. Co.?

A. Simply in response to the def't's counsel's interrogatories.

Q. Did I not ask you of what C't you were an att'y-at-law, and did you not answer the C't of appeals of Md. and of the S. C. of the D. of Col.?

226 The examiner is requested by the witness to read the question proposed by Mr. Norris, to which this question refers.

The counsel for def't objects to the reading of the question re-

ferred to, and says that if the witness has any correction to make or any explanation to make, the proper time to do so is at the end of his deposition.

The first question in this cross-examination being read to the witness, he now repeats his answer to said question, to wit:

That he was and is a member of the court of appeals of the State of Md. and of S. C. of the Dist. of Col., and as he was not asked to name all the courts and each of the courts of which he was a member of the bar, he therefore did not answer further.

Q. Do you mean to state that any court or any place was named where a court was held (in the question)?

A. I supposed that everybody in Washington knew the court of appeals in Md. was held at Annapolis, Md.

Ans. objected to, as not responsive to the question, and the question repeated.

A. In what question——

Mr. Norris: I mean in the first question propounded in the cross-examination.

Witness continuing, says: When asked the first question, which is in these words: "You say you are a member of the bar; what bar?" I do not mean to state anything other than that I have stated in response to that question, as I supposed that was an answer to the question.

Q. Did you read law in Mont. Co.; and, if so, with whom and how long?

A. I read law with the late Jno. Brewer, under his directions for a period of two or three years.

Q. What years?

A. 1841–'2, & '3, as I remember.

Q. Did you reside in Mont. Co. at the time?

A. A portion of the time.

Q. How much of the time, and whereabouts?

A. I resided about half—a portion of the time in Mont-
227 gomery Co., and a portion in Washington; my domicil was Goshen.

Q. Where did Judge Brewer reside at that time?

A. Rockville.

Q. Who presented you at the bar of Mont. Co. for admission, and when was it that you were admitted?

A. Judge Bouic, some fifteen years ago.

Q. Then there was a long time between your reading law and your *your* being admitted to the bar, was there not?

A. A considerable time.

Q. Have you practiced law in any of the courts you have named; and, if so, to what extent?

A. I have not, except in one, and in a single case, in Mont. Co.; it was either before the commissioner's court or the orphans' C't.

Q. You state in your examination-in-chief that you are an att'y for prosecuting claims; state what kind of claims you mean.

A. Principally land, pension, and claims growing out of the late war; indeed, every species of claim against Gov't, whether before Congress or the Dep'ts.

Q. Then your practice as att'y for claims necessarily bring you before the Depart's and the bureau thereof, and the committees of Congress, does it not?

A. It does.

Q. Are you practicing before all the Dep'ts and bureaus; and, if not, please state which you are not?

A. I do business before all the Dep'ts, either directly or indirectly.

Q. How about the bureaus: can you practice before all of them?

A. I do, either directly or indirectly.

Q. What do you mean by the term indirectly?

A. I mean through others.

Q. How do you practice before the Pension Bureau, directly or indirectly?

A. Indirectly.

Q. Why?

228 A. Because I had a difficulty with the present Commissioner of Pensions, and some of those under him.

Q. You state, in your examination-in-chief, that Moses Kelly, about three years ago, or some time subsequent, made an offer concerning this property by way of purchase. Was not Moses Kelly a witness on your behalf in this suit several years before that, and did he not, to the best of your knowledge, know the property was in litigation?

A. I believe he was a witness, and did know that the property was in litigation.

Q. Was that offer to purchase made before or after there had been two decisions in the S. C. of the D. of C. in this suit in favor of def't?

A. My belief is it was after.

Q. Why didn't you, in that case, refer him to the def't?

A. He knew the def't, and it was no part of my business.

Q. Did you seek him or he you *you* when this offer was made?

A. He introduced the subject himself, according to my memory.

Q. Do you state now that Moses Kelly made you an actual offer for these squares, or either of them, at any price?

A. I so understood him to make me an offer for sq. 911 if the title had not been in dispute, or if good title could be had.

Q. And that was within the last three years, was it?

A. I think it was.

Q. Do you not know that for four years past Mr. Kelly has not been buying any real estate?

A. I do not.

Q. Had it not come to your knowledge in some way that since 1874 his speculations in real estate and building were unfortunate?

A. I have heard within the last 12 or 18 months that his speculations have been unfortunate.

Q. You state that a Mr. Durr made you an offer for a lease of ten

years in 1865 for sq. 910 for use as a brick-yard. Who is Mr.
229 Durr, and what was he doing at that time?

A. Mr. Durr is a carpenter and builder, and, I believe, has made brick, and has done work for me for the last 25 or 30 y'rs as carpenter and builder.

Q. Where is he now?

A. The last I heard of him he was on a farm near F't Foot-.

Q. What answer did you give him?

A. In substance that Mr. Davis claimed the property, and I could not make use of it for that reason.

Q. Was that before your suit was commenced?

A. It was.

Q. Did you not, at that time, have or claim possession of s'd square?

A. I did not claim possession of that sq. at that time, because Mr. Davis had ousted my tenant from a portion of the property under a deed in which both squares were alleged to have been conveyed.

Q. Who was your tenant, and what portion of sq. 910 did your tenant occupy, and was it not a very small portion?

A. I did not state that my tenant occupied any portion of sq. 910.

Q. Did I not ask you in my question in relation to the offer of Mr. Durr to lease sq. 910; did you not understand my question in relation to that offer as relating to sqr. 910?

A. I did.

Q. Who was your tenant at that time that you speak of?

A. Geo. Simms was the tenant on sq. 911.

Q. Is that the only tenant you had at the time Durr made you the offer?

A. I did not state that I had a tenant at the time Durr made the offer, Nov., 1865, as Mr. Davis claimed ownership and occupancy, and received rent from Sept. 30th, 1861, from the Gov't of the U. S.

Ans. objected to as not responsive to the question.

Q. Then the tenant that you referred to when testifying of Mr. Davis' offer—was it or was [it] not Geo. Simms?

A. I have already stated Geo. Sims was not my tenant when Durr made me the offer, as Mr. Davis had induced him to attorn to him (Davis) previously, to wit, from July, 1865.

230 Ans. objected to.

Q. You state that Mr. Davis had dispossed your tenant under a deed by which he claims those two squares?

A. I did not so state, but that Mr. Davis induced my tenant to attorn to him, and dispossessed me by having my tenant attorn to him.

Q. Who was that tenant that attorned to him?

A. The tenant that Mr. Davis induced to attorn to him was Geo. Simms.

So much of the ans. as is not responsive to the question, objected to.

Q. How long has Durr, that you spoke of in your testimony, been away from Washington?

A. I do not know.

Q. He was anxious in 1865 to lease that 910—he desired to lease it, and you state that Mr. Davis claimed it; why did you not refer him to Davis?

A. I do not remember why.

Adjourned to Saturday, March 8th, 1879, 2 o'clock p. m.

THOMAS HOOD, *Auditor.*

SATURDAY, *March 8th*, 1879—2 o'clock p. m.

Present: S. A. Peugh, compl't, & J. E. Norris, att'y for def't.

S. A. PEUGH, compl't, recalled for cross-ex. by Mr. NORRIS:

Q. Did you ever state to Mr. Davis that you had application for sale or rent of these squares?

A. I did not, for the reason that like application was made to Mr. Davis, and he had refused, as I am informed.

Q. Who informed you Mr. Davis had declined to rent them?

A. Mr. Moses Kelly.

Q. When?

A. It was some time since, but I do not remember the precise time. Mr. Kelly informed me — had requested Mr. Wilson E. Brown to see Mr. Davis in relation to renting or purchasing
231 these squares, and that Mr. Davis had declined to entertain the proposition. This must have been some time ago, as Mr. Brown has been dec'd for some two or three years.

Q. You state in your examination-in-chief that you have collected claims against the Gov't for rent of property used by the Gov't; please name the parties for whom you collected such rents, or any of them.

A. I collected for several; I remember now P. O'Donohue and Prof'r Coffin, of the U. S. Navy.

Q. Where was the property?

A. O'Donohue's was located on Delaware Av. & M St. N. E.; Coffin's property was in the first ward, I think on G St.

Q. In what year or years was this?

A. I think I collected for Coffin in 1867; for O'Donohue was about the same time. I speak from memory.

Q. What was the claim for which you collected this rent, and how much?

A. The claim was for rent of the property indicated; I think the amount collected for Mr. O'Donohue was about $2,000; Prof'r Coffin's was a less amount.

Q. What quantity of property was so used by the U. S. for which these claims for rent were made?

A. I do not now remember, but I think Mr. O'Donohue's was one whole square; Prof'r Coffin's was one or two lots of ground; it was this property I designated.

Q. How long had the Gov't used and occupied the property?

A. I do not now remember, nor can I ap-roximate it.

Q. You have claimed in your account $1,000 for professional services for your counsel, and you state that you based that upon the opinion of eminent counsel; please name who they were.

A. The communications to and with my counsel are privileged communications.

Q. Is that your answer?

A. My answer is, Mr. Morris advised me that $1,000 for my services was not an exorbitant charge.

232 Q. When you name Mr. Morris do you refer to one of the attorneys in this case.

A. Yes.

Q. Is that all the fee that you expected your attorneys to get, or have you not given a deed of trust to secure the sum of $5,000 to Mr. R. T. Merrick and $1,200 to Mr. Crittenden on the property now in suit, to wit, squares 910 & 911?

A. The first clause of this question I decline to answer. The second will show for itself that I made such a deed for such a purpose. I mean the purposes of this suit.

Q. Having claimed one thousand dollars for att'y's service in this cause and having given a deed of trust, as you have stated, to your counsel to secure to them the payment of $6,200, why did you not incorporate that in account filed against Mr. Davis and thus make the whole charge $7,200.

A. Because I regarded it as my prerogative to make my ac. in my own way within reason.

Q. You state in your ac. a charge of $500 against def't Davis for prosecuting a claim before Congress; when was that and what was the agreement, if any, between you and Mr. Davis?

A. It was sometime previous to the allowance of the claim and *and* the agreements was to pay me a fee of $500 upon the successful prosecution.

Q. When was the claim allowed?

A. I think in Feb'y, 1867.

Q. Did you ever present you bill to the def't and claim the pay't of this $500 until the filing of your ac.?

A. I do not remember that I did, because I had borrowed $2,000 of Mr. Davis and supposed he would allow me this credit of $500 on the settlement of our ac.

Q. When you filed your bill in equity in this cause was not that after you had performed this service, and, if so, why did you not prepare for this set-off of $500 in that bill?

A. It was before the bill in equity was filed. It was omitted

233 because I expected the court would, under my sixth prayer, grant such further and other relief as the nature of the case might require, and there was other unsettled ac. between us, and this $500 formed an item of that ac.

Q. Was that your only reason for not mentioning this item of $500 in your bill?

A. I do not now remember what other reasons might have influenced me.

Q. Did you give testimony as plaintiff in your own behalf in

this cause? And, if so, please state whether you mentioned or alluded to this item of $500 in your testimony; what I mean is in the examination before the examiner in this cause before trial.

A. I think I did give testimony before the examiner. I do not now remember whether in that testimony I alluded to this item or not.

Q. Do you not know that you did not allude to the said $500 [in] your testimony?

A. My impression is I did not allude to it.

Q. Did you not know at the time of your filing your ac. in this cause before the auditor that you had not made a demand on Mr. Davis for the $500 claimed in your ac.?

A. My impression is that I did not remember of having made a demand on Mr. Davis. Here the att'y for Mr. Davis puts in the plea of limitation to the claim of $500 set up by the plaintiff as due him for the reason that from his own testimony, if said claim ever had an existence, it accrued three years and more before the same was demanded. And counsel for def't says that the claim of $1,000 set up in said ac. for att'y's services on behalf of plaintiff is not allowed in law to be taxed against the def't.

Q. In reference to the item in your ac. against Mr. Davis for money received from the U. S. Gov't for the use and occupation of these squares 910 & 911, do you not know that Mr. Wm. Pettibone, who prosecuted this claim, rec'd one-fourth of the amount allowed for his services?

234 A. I have heard it so said, but Mr. William Pettibone and Mr. Davis were both intruders upon my rights in respect thereto.

Q. Did not Mr. Pettibone tell you that he had rec'd one-fourth of the am't collected?

A. He did so tell me, but I did not regard his telling me so as giving him any right to do so.

Adjourned to Monday, March 10, '79, at 2 o'clock p. m.

S. A. PUGH.

Sworn to and subscribed before me, this 8th day of March, 1879.

THOMAS HOOD, *Auditor.*

MONDAY, *March 10th*, 1879.

Met pursuant to the above adjournment.

Present: Mr. Norris, counsel for def't; Mr. Morris, counsel for comp't.

When, it being announced that compl't had closed his testimony in chief, and the def't not having his witnesses present, hearing was postponed to Wednesday, March 12th, 1879, at 2 p. m.

THOMAS HOOD, *Auditor.*

WEDNESDAY, *March 12th*, 1879—2 o'clock p. m.

Met pursuant to adjournment.

Present: S. A. Pugh, complainant; J. E. Norris, for def't.

The complainant admits the statement contained in statement in

writing made by Wm. J. Donahue, and filed herein, as Exhibit "A," Jan'y 6th, 1879, as correct, without further proof. The complainant also admits the statement in writing, made by Thomas C. Cox, water register, filed herein by def't, Jan'y 6th, 1879, marked Exhibit "B," as correct, and waiving further proof thereof. It appearing that the subpœna issued for Wm. Pettibone was not served ——

The further hearing *hearing* adjourned until Thursday, 2 o'clock p. m., March 13, 1879.

THOMAS HOOD, *Auditor.*

235 THURSDAY, *March 13th*, 1879—2 o'clock, p. m.

Present: S. A. Pugh, complainant, and J. E. Norris, sol'r for def't.

WM. PETTIBONE was called on behalf of def't, and sworn:

Q. State in what business you was engaged in the year 1876.

A. I was engaged in the business of a claim agent against the Government in this city.

Q. How long previous to that time had you been engaged in that business?

A. From soon after the close of the war; I think in 1866.

Q. State whether you prosecuted a claim in behalf of H. S. Davis, def't in this case, for the use and occupation by the Government of squares 910 & 911, or either of them, in this city, and state the result of your efforts in that matter.

A. I did prosecute a claim such as indicated to a successful termination. I rec'd first from the Government $25 for fencing; this was rec'd May 11, 1875; after that I received as a final settlement for the use of these squares by the Gov't $1,241$\frac{82}{100}$, on the 23d of August, 1876.

Q. Witness is shown voucher "B," filed herein by compl't, and asked if the amount stated therein is correct in that order.

A. It is; the voucher for $25 is also correct.

Q. What compensation did you receive for the collection thus made for Mr. Davis, as per said two vouchers.

A. Twenty-five per cent. on all collections made.

Q. State, if you please, whether from these two amounts that you have named, you received from Mr. Davis 25 per cent.—your collection fee—that is, did Mr. Davis pay you that fee?

A. I received the drafts from the U. S. Treasury for the amounts stated; I turned them over to Mr. H. S. Davis, and he paid to me the fee agreed upon, viz.: 25 per cent., which I might say was satisfactory to both of us.

Q. State, if you please, why the amount of the draft, $1,241$\frac{82}{100}$, was *was* not paid at the time the $25-draft was paid?

236 A. I was informed by an officer of the 3d auditor's office that there was no appropriation available to pay the award upon which the $1,241.82 draft was afterwards issued.

Q. State if you know of any effort or act on the part of Mr. Davis, in addition to your own employment, in aid of the collection of the sums of money you have referred to.

A. Judge Dunn, of the War Dep't, took the ground that there was no rental value fixed for the squares of ground 910 & 911 referred to, and — Government was not willing to pay more than $400 for the use of the same. I declined to receive that award. Judge Dun said he would like to see Mr. Davis. I informed Mr. Davis of this request. Mr. Davis, as he informed me, did himself have an interview with Judge Dunn. Mr. Davis refused to receive $400 award, and preferred to receive nothing rather than receive the $400 award, and the question was discussed fully between the parties, when Judge Dunn came to the conclusion to allow the award afterwards made for $1,241.82.

Cross-ex'n:

Q. Under what act of Congress were claims for rent made for the use of property by the Gov't of the U. S. during and since the war?

Objected to, because not consonant with any examination of this witness in chief.

A. There is no general — upon that subject; but the Government has acted upon the broad princip*al* of protection to the person and property of the citizen. This — gu-anteed by the Constitution.

Q. You have stated that your business since about 1866 was the prosecution of claims before the departments. When did the Q'rmaster's Dep't cease to pay claims for rent, and for what reason?

Objected to, as not responsive to any testimony given in chief, and is irrelevant and immaterial.

A. At the end of the fiscal year, June, 1874—for the reason that Congress passed an act that the unexpended balance should be turned into the Treasury.

237 Q. Have you not stated as a reason why the larger sum, $1,241.82, was not paid, when the smaller one for $25 was paid, because there was no appropriation?

A. I have so stated, and given the reason therefor.

Q. Were not these claims for rent paid by the Q'rmaster's Dep't prior to the act of 1874, referred to in your previous answer?

Objected to, as irrelevant, immaterial, & assuming a fact to which the witness has not testified.

A. These claims were paid by the Q'rmaster's Department previous to the act of Congress turning the unexpended balances into the Treasury in 1874.

WM. PETTIBONE.

Subscribed and sworn to before me, March 13th, 1879.

THOMAS HOOD, *Auditor.*

Further hearing adjourned to March 14th, 1879, 2 o'clock p. m.

THOMAS HOOD, *Auditor.*

FRIDAY, *March 14th*, 1879—2 o'clock p. m.

Parties met pursuant to above adjournment, when, at def't's request, hearing was postponed to Monday, March 17, 1879, at 2 o'clock p. m.; previous to which the def't filed with the auditor his supplemental account, marked Exhibit E.

THOMAS HOOD, *Auditor.*

Met Monday, March 17th, at 2 o'clock p. m., as per adjournment. Present, all the parties; but owing to the other engagement of Mr. Morris, co-nsel for compl't, at his request further hearing was postponed until Wednesday, March 19, 1879, at 2 o'clock p. m.

THOMAS HOOD, *Auditor.*

238 WEDNESDAY, *March 19th*, 1879—at 2 o'clock p. m.

Met pursuant to adjournment.

Present: The parties to this suit, Mr. Morris, counsel for compl't, when, owing to the absence of Mr. Norris, counsel for def't, further hearing was postponed to Saturday, the 22d inst., at 2 o'clock p. m.

THOMAS HOOD, *Auditor.*

SATURDAY, *March 22d*, 1879.

Met pursuant to adjournment.

Present: Walter Davidge, Esq., for def't, and M. A. Morris, Esq., counsel for compl't, and several witnesses, when ANTHONY HYDE was produced on behalf of def't, and, being sworn, says:

My residence is Georgetown, D. C.; occupation, agent. I have resided in this District all my life, since the 7th Sept., 1810.

Q. During that time have you or not had much experience with reference to real estate?

A. I have.

Q. Are you familiar with the rental value of outlying unimproved property in the city?

A. I am, to a considerable extent.

Q. Are you familiar with the value of real estate in the N. E. section of the city—I mean its value for use & occupation for the last 15 years?

Objected to, as irrelevant.

A. Not sufficiently to express an opinion.

Q. What has been the use and occupation value of outlying property generally in this city during that period?

A. So far as I know six per cent. on the assessed value of the property—vacant property.

Q. Do I understand your answer to refer to use and occupation value or the rental value, where such property has been rented?

A. I refer to the rental value.

239 Q. Suppose a man to have been in possession of such property under what was advised was a clear and unimpeachable title, and not to have succeeded in renting it; what would you consider a reasonable rate at which to charge him for the use and occupation of the property?

Ans. I cannot answer that. If I did, it would be the 6 per cent. as in the previous answer.

Q. Have you, as owner or agent, held or managed any unremunerative unimproved real estate in the city during the past 15 years?

A. As agent I have.

Q. To a great or small extent?

A. Great extent.

Q. Was any of it in the N. E. section of the city?

A. Yes.

Q. In what locality?

A. Bet. N. J. Av. & 5th, S, & T; also, south of H, & bet. 10th & 12th sts. E.

Q. How does the rental value of property in that section compare with its rental value in the other sections of the city?

A. I have never rented any in the N. E. section of the city, and cannot tell.

Q. If you should be unexpectedly dispossessed of such unremunerative property, what would you consider a reasonable rate at which to be charged for its use and occupation while you held it under what you had every right to believe was an unimpeachable title?

Objected to, as too theoretical and argumentative.

A. I should under any circumstances say six per cent. on the assessed value was the proper rental of vacant ground.

Cross-examination waived.

ANT. HYDE.

Sworn to and subscribed before me, this 22d day of March, 1879.

THOMAS HOOD, *Auditor.*

GEORGE W. RIGGS, being sworn on behalf of def't, says:

I reside in Washington city; am a banker by occupation; have resided here uninterruptedly since 1840.

240 Q. Have you been during that period and are you now the owner of vacant unimproved real estate in the city of Washington; and, if so, to what extent?

A. I hold vacant property; I own a good many vacant lots; I own some squares and vacant lots besides.

Q. I wish you would state, as nearly as you can, the fair annual rental value of unimproved property?

A. I don't think it is worth any rental; I never have got any; I speak in cases where the property is to remain unimproved.

Q. Have you ever had occasion to rent any unimproved property in this city?

A. I have given the use of vacant property rent free to the Dist. gov't and others.

Q. Do you mean you have given it rent free because it had no rental or market value?

A. I know nothing of rental market value, but I could get nothing

for it; I gave the rent with the understanding it was to be kept in order.

Q. Do you own any vacant real estate in the N. E. section of the city?

A. I think not; I don't remember any.

Q. Your operations in real estate have been very extensive, I believe, and I understand you to say that in no instance have you been able to receive any rent from vacant property?

A. I think, in one instance, a butcher paid me a small trifling rent for a square of ground a good many years ago, but I don't remember—there was a shed on the property that was used for slaughter-house and the ground was used for cattle; it was fenced.

Q. Mr. Riggs, I must trouble you to be a little more definite in respect of the extent of vacant real estate owned by you and where situated?

A. I can't be particular from memory without referring to books & papers.

It is agreed between counsel that the witness may file a statement of the vacant real estate owned by him in the last 15 years.

241 Q. I think, in addition to your profession as banker, you have devoted a portion of your time to farming; I wish you would state whether in your experience as a proprietor of vacant real estate there has been any demand for said property to be used for cultivation, and whether such property could [be] so used as to yield a profit?

A. Some years ago I held a square on which was a dwelling-house, the square being fenced, and my tenant used the square as a garden; he was unable to pay rent, stating he could make nothing out of the garden; he rented the house and square.

Q. From what you have stated I am induced to ask you whether you would rent any outlying sq. to a tenant who would pay the annual tax upon it?

A. Most willingly, if I could get possession when I wanted to sell it, giving reasonable notice to the tenant.

Q. And would you willingly pursue that course in regard to all your unimproved property?

A. I would.

Q. What is the source of profit accruing to the owner of unimproved property—you have said it has no rental value, and that you have never been able to get any rent; now, from what source is a profit derived by the owner—upon what does he depend for a fair return of his investment?

A. I can imagine no other source, if there be a profit, except the increased value from the growth of a city and other circumstances.

Cross-examination waived.

GEORGE W. RIGGS.

Sworn and subscribed to before me, this 22d day of March, 1879.

THOMAS HOOD, *Auditor.*

Mr. M. W. GALT, being produced on behalf of def't, and sworn and examined by Mr. DAVIDGE, says:

I reside in Washington, and am a jeweler by occupation; have resided here over 50 y'rs.

Q. Are you the owner of any real estate in the city; if yea, state what, and the extent of it, and where situated.

A. I own a sq. on H St., sq. 981, bet. H. & I, 11 & 12; have owned it about 3 y'rs.

Q. What rent has that sq. ever yielded you for use and occupation?

A. Nothing; on the contrary it has cost me near $1,200 to improve it; I had it levelled and it cost me that amount.

Q. Have you ever had an application to rent it?

A. No.

Q. Have you ever owned any other unimproved property in that neighborhood; and, if so, what, and how long did you own it?

A. I had a half interest in sq. 909 in the same neighborhood; I had this interest about 5 y'rs, from '70 to '75.

Q. Did that ever yield you any rent?

A. No.

Q. Now I believe you are a gentleman of large business experience, and I would ask you if you ever knew or heard of unimproved property yielding any rent for use and occupation in this city?

A. I never heard of any except the Gov't, in time of the war, paid rent, a small rent as I have heard; with that exception, I never knew or heard of rent being paid for such property.

Q. I wish you would give me some approximate estimate in general terms of the extent of unimproved property in this city.

A. A map will tell that; there are colored maps that will show the unimproved property is of vast extent.

Q. Now, if you invested your money in unimproved real estate, upon what would you depend for a profit upon the investment?

A. Upon an increased valuation, caused by the growth of the city.

Q. Would you estimate any return upon your investment during the period intervening between your purchase and the sale of the property?

243 A. No.

Q. Then you would expect to pay the purchase money, taxes, and assessments and look for any profits exclusively to what you might realize from the sale of the property, or its improvement, if you thought fit to improve it?

A. I would.

Q. Do you know or can you conceive of any use to which outlaying squares in this city could be put so as to enable a tenant to pay rent?

A. I don't know nor can I conceive of any.

Cross-examination waived.

M. W. GALT.

Sworn to and subscribed before me, this 22d day of March.
THOMAS HOOD, *Auditor.*

Mr. HENRY A. WILLARD, being produced on behalf of the deft, and being sworn and examined by Mr. DAVIDGE, says: I reside in Washington, and have done so thirty years.

Q. Do you own or have you owned during your residence in this city any unimproved real estate here; if yea, state as well as you can what, and where situated.

A. I have; I own some in the N. E. section, and have owned some in the northwestern section of the city.

Q. Give me as nearly as you can, an approximate estimate of the amount or quantity.

A. I have owned half of two squares (the undivided half interest) in the N. E. part of the city; one whole sq. in the N. W. part, and a number of vacant lots which I cannot particularize.

Q. Well, according to your experience, what is the rental value of the use and occupation of such improved property?

A. I don't know what the rental value is.

Q. Is there any?

A. I don't know that there is.

214 Q. Have you ever received any?

A. I received something for the use of a square used by a circus Co.

Q. How long did that use continue?

A. As long as the Co. exhibited.

Q. Have you ever heard of such a thing as any market value in respect of the use and occupation of unimproved property in this city?

A. I have not.

Q. Do you know, or can you conceive how, as a general rule, such property can be utilized so as to enable a tenant to pay rent?

A. I can conceive that Sqs. might be used for gardening purposes, but am unable to say whether they could pay rent for it or not.

Q. Has any application ever been made to you for any of your unimproved property for gardening purposes?

A. Never.

Q. Upon what does a capitalist rely for profit upon his capital invested in unimproved property in this city?

A. Upon its rise in value exclusively; certain- not upon cultivation.

Q. What is the property you own in the N. E. section of the city?

A. I am interested in -qr. 932, I think, and 909.

Q. How long have you been interested in those Sqs.?

A. Within 3 or 4 years.

Q. Have you ever received any application to rent either of them?

A. No.

Q. Have you ever tried to rent them?

A. No.

Q. Why not?

A. Because there was no prospect of finding a customer.

Cross-examination waived.

H. A. WILLARD.

Sworn and subscribed to before me, this 22d day of March, 1879.
THOMAS HOOD, *Auditor.*

245 Adj'd to Tuesd-y, March 25, 1879, at 2 p. m.
THOMAS HOOD, *Auditor.*

TUESDAY, *March 25th*, 1879.

Met pursuant to adjournment. Present: Mr. Morris, counsel for def't, when Mr. Norris stated that on account of the illness of his client, who was unable to be out of his house, he should have to request the auditor to adjourn this hearing to to-morrow, Wednesday, March 26th, 1879.

THOMAS HOOD, *Auditor.*

TUESDAY, *March 26th*, 1879—2 o'clock p. m.

Met pursuant to adjournment. Present: Jno. E. Norris, Esq., counsel for def't, when Mr. Norris stated that his client was unable to be out, and requested that further proceedings be postponed to Friday, March 28, 1879, at 2 p. m. So ordered.

THOMAS HOOD, *Auditor.*

FRIDAY, *March* 28, 1879—2 o'clock p. m.

Met pursuant to adjournment. Present: Mr. Morris, counsel for complainant, Mr. Norris, counsel for defendant, when further hearing was postponed to to-morrow, Saturday, —'29, 1879, at 2 p. m.

SATURDAY, *March* 29, 1879—2 o'clock p. m.

Met pursuant to adjournment. Present: Mr. Norris, counsel for def't, when the defendant, Mr. HENRY S. DAVIS, being produced on behalf of himself and sworn, says: My name is Henry S. Davis; I am the defendant in this cause.

Examined by Mr. NORRIS:

Q. Have you bought & sold real estate in the city of Washington in the last 20 or 30 years?

A. I have.

Q. State, if you please, whether you have a knowledge of unimproved property in the outer part of s'd city; and, if so, state what could be realized in the way of rents and profits on it.

A. I have a knowledge. I have never been able to realize anything whatever on what I owned within the last 30 years.

Q. You once claimed title to squares 910 & 911, which were the subject-matter of this suit; state, if you please, what you ever realized, and from what source, for the use and occupation of s'd squares.

246 [A.] The whole of what I received is fully set forth; my ac. filed as an exhibit in this cause, except a $25 warrant

from the Gov't, dated May 11, '75, which was overlooked in the returns made to me by the Ag't, Mr. Pettebone, which caused the mistake of my not rendering it in my ac., but I am now satisfied that Mr. Pettebone's testimony in the case is correct.

Q. You rec'd a warrant from the Treasury Dep't on the 23d Aug., 1876, for $1,241.82 for the use and occupation of s'd squares by the army of the U. S. State who prosecuted that claim and what percentage you paid for the collection of it.

A. Wm. Pettibone prosecuted the claim, of which he rec'd 25 per cent., which I paid, and the balance was turned over to me; and Mr. Pettibone prosecuted the claims for my own unimproved property for which I paid him the percentage for his services.

Q. State what rents and profits you have rec'd for the use and occupation of squares 910 & 911, except as already stated in your testimony and in your ac. exhibit?

A. Not one cent.

Q. What offer, if any, was ever made to you for renting or leasing s'd squares 910 & 911, and, if any such was made, state when and by whom?

A. I never had any offer whatever from any person to rent or lease both or either of s'd squares.

Q. As the owner of improved & unimproved real estate in the city of Washington, if you please, what, in your opinion, could have been realized in the way of rents and profits for the use and occupation of said squares within the last 15 y'rs independent of taxes and assessments?

A. My opinion is that one dollar in the past 15 y'rs could not have — realized for the rental of it, and the reason is obvious, because nobody wanted it at any price, else they would have mad- it known.

Q. From your experience as owner of outlying unimproved property, state whether 6 per cent., or any other per cent., could have been realized on such property over and above the taxes and assessments; and, if you state yea, state what?

247 A. From my knowledge, interest, and experience from dealing in property unimproved, say for the last 25 or 30 years, that no outside property in this city would pay one farthing on the assessed value thereon.

Q. When you remark that outside unimproved property for the last 15 years would not realize anything over and above taxes and assessments, state whether you meant that as a general rule or whether there might not have been exceptions to it in particular cases?

A. What I have stated is in my experience, and if there is any exception to that I have no knowledge of it.

Q. In your answer to the last question, state what you have to say in relation to the use and occupation of unimproved lots and squares by *by* the army during the war, and whether or not that was not an exception?

A. It certainly was an exception, as I have not been able to rent, lease, or receive any benefit, whatever from any individual or indi-

viduals in the way of rents and profits, or any unimproved property whether it was out or inlying property.

Q. What efforts, if any, have you made to rent or lease your unimproved property?

A. I never made any efforts to rent or lease it, because I believed, and am satisfied, that any attempt or effort that I should make to rent or lease such property would prove abortive and a failure.

Q. Witness being handed his supplemental ac., marked Exhibit D, is asked to state upon what you base your claim as then charged, giving particulars, beginning with the first item?

A. Through my exertions in the Wiltberger claim against squares 910 & 911 he was prevented from recovering a claim made by him on a tax title. Soon after, squares 910 & 911 appeared on record in my name, Wiltberger entered suit against me to upset my title to said squares, which title I obtained from Samuel A. Peugh and wife, and which I had to defend, which took time and trouble, and Wiltberger was finally defeated in the suit.

218 Q. State what, in your opinion, was a reasonable charge for the time, labor, services, and trouble of defending said suit?

A. I believe it is truly set forth in this supplemental ac.:

Services (if paid at the time)	300
Int. to Ap'l 1st, '79	362 50
Total	8662 50

To which sum I believe I am justly entitled.

Q. State what you have to say as to your services in recovering the claim on sq'r's 910 & 911 against the Gov't, which was paid Aug. 16, '76.

A. I authorized Mr. Pettibone to collect from the Gov't whatever moneys he could on said squares. After getting his data, which took him some time, he went before the Q. M. Dep't and obtained from them an award for the use of said squares by the Army; that award, as he reported to me, was $400 for such use. I stated to Mr. Pettibone that I would not accept it; that I would sooner give it to the Gov't than take any such award; that he could inform the Q. M. Dep't of what I said, which he did; he informed Gen. Dunn, and Gen. Dunn expressed a desire to see me in person; I called on Gen. Dunn, at his request, and we had a long conversation about the matter, he expressed the opinion before I left him, that the award was too little, and he would see if he could not get a review in the case. I informed Mr. Pettibone of the interview I had had, and that I thought Gen. Dunn would very willingly try and get a review in the case, and told Mr. Pettibone he had better follow it up and attend to it at once, which he did, and soon returned to an award of $1,241.82, out of which I paid Mr. Pettibone his 25 per cent.

Q. Explain what you mean by the 3d item—the prompt payment of taxes for which you charge $1,000?

A. All special assessments, and all the general complaints (part sq. 911 being under water), I think the general care of the property, paying the taxes promptly, getting the reductions made, and being harassed about nuisance for 20 years, was fully worth $1,000.

249 Adjourned to meet at notice for cross examination.

THOMAS HOOD, *Auditor.*

TUESDAY, *April 1st*, 1879.

Gave notice of hearing to be had on Thursday, April 4th, 1879, at 2 o'clock p. m.

THOMAS HOOD, *Auditor.*

WEDNESDAY, *April 2d*, 1879.

The defendant, with his counsel, Mr. Norris, and stated that in the matter of adjournment to April 4th, as noted above, he could not be present on that day or any other day prior to Wednesday, April 9th, at 2 o'clock p. m., and requested a postponement till that day and hour.

So ordered.

THOMAS HOOD, *Auditor.*

WEDNESDAY, *April 9th*, 1879.

Counsel for comp't & def't appeared, but owing to absence of principals, hearing adjourned to Thursday, April 10, '79.

THOMAS HOOD, *Auditor.*

THURSDAY, *April 10th*, 1879.

Present, def't and his counsel. Hearing resumed. Said Mr. Norris desired it entered into this record that def't is here by appointment for cross-examination, and neither the plaintiff nor his counsel appearing. Mr. Norris now concludes his examination of the witness by this question, viz:

Q. Did you ever at any time employ the plaintiff, Mr. S. A. Peugh, to prosecute a claim on your behalf before Congress? If so, state what it was, and when.

A. I never did employ Mr. Peugh to prosecute a claim for me before Congress or anywhere else.

HENRY S. DAVIS.

Sworn to and subscribed before me, this 10th day of April, 1879.

THOMAS HOOD, *Auditor.*

Counsel for complainant on hearing the nature of def't's evidence as above taken, requested a hearing on Saturday, April 12, at 2 p. m., for the purpose of cross-examining said def't on his testimony.

So ordered and notices served.

THOMAS HOOD, *Auditor.*

250 SATURDAY, *April 12th*, 1879—2 o'clock p. m.

Met pursuant to notice.

Present: J. E. Norris, Esq., of counsel for def't. Said def't present, himself for cross-examination, being the third time since his exam-

mination-in-chief, and no one appearing upon the part of compl't to cross-examine said def't on his said testimony, and the def't claiming that he should not be required to further appear for cross-examination, he is therefore discharged appearance before the auditor.

THOMAS HOOD, *Auditor.*

THURSDAY, *April 17th*, 1879.

Met pursuant to summons.

Present: Mr. Norris, counsel for def't, and compl't and def't in person.

Examination of def't reopened by Mr. NORRIS:

Q. Mr. Davis, state whether you paid the taxes, assessments, expenses, and charges set forth in your ac. here filed with the auditor, and referred to in Exhibits A, B, C, & D.

Ans. I did, sir.

Counsel for def't now presents a certified copy from the registry of deeds, dated 10 Ap'l, 1878, from Caroline S. Peugh and the compl't to Robert S. Lacy & Martin F. Morris, to secure R. T. Merrick in the sum of $5,000, and to secure T. T. Crittenden the sum of $1,200, and asks that it be annexed to his testimony as an Exhibit E, and filed with the auditor on the 16th inst.

Cross-examined by Mr. MORRIS, counsel for compl't:

Q. Mr. Davis, did you have any claim before Congress in the y'rs '66, '67 or thereabouts?

A. I can't say certainly whether I had a claim before Congress at or about that time or not; I did have a claim for $5,700 (about) for work done in the west wing of the Patent Office; my impression is that that claim was paid in '65; I may be mistaken, however.

Q. That claim was before Congress, and before the Committee on Public Buildings & Grounds?

251 Q. Was there any act of Congress authorizing the payment of that claim?

Objected to, for the reason that if there is such an act in existence the production of it is the best proof thereof.

A. There was.

Q. Did you ever employ any attorney or agent to attend to that matter for you before Congress?

Objected to, as immaterial, irrelevant, and not falling within the scope of inquiry before the auditor, under the decree of court in this case.

A. I did employ an agent to attend to that matter before Congress.

Q. Who was the agent employed by you?

Same objection as above.

A. A man by the name of Pitcher—Chas. A., I think—for which I paid him $1,500.00, and he was the only man that I ever employed

to prosecute that claim before Congress, and that was the only claim I ever had before Congress.

Q. Mr. Davis, I find among the papers in Exhibit C one purporting to be a receipt from Mr. Davidge for professional services to the am't of $50, was this paper originally included in this exhibit; and if it was not, when was it inserted?

A. It has been inserted since this case commenced and since the original exhibit was filed, and I paid Mr. Davidge that amount for his services in the Wiltburger case.

Q. When was that receipt written?

A. Since the commencement of this suit before the auditor; it was paid to him at the same time I paid Mr. Carlisle and Mr. Redin; I made a note of it at the time Mr. Davidge acknowledged it.

HENRY S. DAVIS.

Sworn and subscribed to before me, this 17th day of April, 1879.

THOMAS HOOD, *Auditor.*

Mr. PEUGH, complainant, recalled:

252 Q. Look at that paper filed in Exhibit C, and purporting to be a rec't from Caroline Peugh for $100, and state whether you ever received that money or authorized Mrs. Peugh to receive it for you, or whether Mrs. Peugh ever actually rec'd it or not.

Objected to, for the reason that Mrs. Peugh would be the best witness, and there is no reason given why Mrs. Peugh cannot be here.

A. I have no recollection of its being paid me, and I do not believe it ever was, or to Mrs. Peugh, except, if paid at all, it was a portion of the $2,000 paid on the 9th day Feb'y, 1858, or the day before.

Cross-examined by Mr. NORRIS:

Q. Mr. Peugh, in whose handwriting is that signature to that receipt now under consideration?

A. I would not swear in whose handwriting it is.

Q. Will you swear that it is not in your own handwriting?

A. I will swear that I believe it is not.

Q. Will you state whether it is in the handwriting of Mrs. Peugh, your wife.

A. I will not state.

S. A. PEUGH.

Sworn to and subscribed before me, this 17th day of April, 1879.

THOMAS HOOD, *Auditor.*

253 Hearing before the auditor May 15, 1879, — p. m.

Present: Mr. Norris, for complainant, and H. E. Davis, for def't.

JOHN F. COOK, collector of taxes for the District of Columbia, appeared before the auditor and states that he is not the custodian of the tax books of the District, but merely the collector of taxes: that

on the 10th of April, 1879, by order of the District Commissioners, he turned over to the District treasurer and assessors all tax books, and these officers is now the custodian of those books, and I have only the current day books of the office in my possession. Witness further states that by request of Mr. Peugh, complainant, he made a statement in writing to him of payment of taxes on these squares 910 & 911 from the years 1865 to 1878, inclusive. Subsequently Mr. Peugh called, and by order of the Commissioners of the District I made a further statement in writing, commencing with the taxes paid on these squares for the years 1858 up to 1865, inclusive. The statement first above referred to was prepared by a clerk in my office. The statement last referred to I made myself.

JOHN F. COOK,
Col'r D. C.

Subscribed & sworn to before me, May 15th, 1879.

THOMAS HOOD, *Auditor.*

It is agreed by counsel that "Exhibit A" filed by def't on January 6, 1879, copied from the tax books of the District, but is subject to allowances made for discount.

That papers filed to-day, being statements in writing, by the sec'y of the Commissioners, being the same papers referred in the testimony of J. F. Cook, and marked Exhibit J. F. C., 1-2.

254 Counsel for the def't asks it to be stated that when def't filed Exhibit A, the paper purporting to set forth the taxes and assessments on squares 910 & 911, he relied upon the statements given to him from the tax office, and believes the same to be correct, as showing the amounts actually paid by him.

Mr. Morris, for complainant, and Mr. Norris, for def't, here state this audit is closed.

THOMAS HOOD, *Auditor.*

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265 In the Supreme Court of the District of Columbia.

SAMUEL A. PEUGH
vs.
HENRY S. DAVIS. } Equity. No. 1713.

The report of Thomas Hood, auditor, filed herein on the 21st day of February, 1880, and the exceptions, as well of the complainant as of the defendant thereto, coming on for the consideration of the court, and being by the court considered, it is this fourth day of November, 1880, adjudged, ordered, and decreed that the said report be, and it hereby is, set aside, and that this cause be, and it hereby is, referred to the auditor of this court for the statement of an account between the parties hereto in accordance with the opinion and decision of the Supreme Court of the United States herein. The opinion of that court declares "that the defendant should be charged a reasonable sum for the use and occupation of the premises during his possession."

The testimony taken in the cause shows that the premises were of no value to the defendant in respect to use and occupation in the usual import of these terms; but it appearing to the court, that under the circumstances of the present case, use and occupation may be held to include some reasonable compensation to the com-
266 plainant for loss by reason of such use and occupation, whereby he was prevented from developing and disposing of the property, the auditor is directed that the defendant be charged as representing such compensation the annual general taxes, and also one or two per cent. per annum upon the market value of the property, to be fixed by the auditor.

The defendant should be allowed all general taxes paid by him prior to his occupation, with interest; all special taxes, whenever paid by him, whether prior to or during his occupancy, with interest, and his expenditures in defending the title against the claim of Wiltberger, with interest.

He should be charged with the sums received by him from the Government of the United States for the occupation of the property and destruction of fencing between the years 1861 & 1865, and with the costs in the cause to be taxed by the clerk up to, but not including, the proceedings before Thomas Hood, auditor, and his report, the auditor, is directed to fix a reasonable fee for the services of the said Hood herein, and to report the same subject to the order of the court.

No tender has ever been made by the complainant to the defendant of the debt, interest, &c., herein involved, and in stating the account the auditor should apply the charges against the defendant when accruing in the following order:

First, to the interest on the expenditures allowed defendant;
267 Secondly, to those expenditures themselves;

Thirdly, to the interest on whatever portion of the principal of the mortgage debt may be still unpaid; and—

Finally, to the extinguishment of the debt itself.

W. S. CASE, *Justice.*

268 *Report of Auditor.*

In the Supreme Court of the District of Columbia.

SAMUEL A. PEUGH
vs.
HENRY S. DAVIS. } No. 1713. Equity Docket 9.

This cause is referred to the auditor for the statement of an account between the parties hereto, in accordance with the opinion and decision of the Supreme Court of the United States, and with specific direction as to the manner of stating said account and allowances to be made; as will more fully appear by reference to the decree of the 5 Nov., 1880.

After due notice I proceeded, on the 18th Nov., 1880, and subsequent days to the 18th May, 1881, in the execution of this order of reference, and I herewith return as part of this report the depo-

sitions and exhibits submitted in proof by the respective parties. I also return herewith the statements of the respective parties by way of illustration of their respective claims, together with the written argument of the plaintiff. On the part of the defendant the matter was argued orally after the submission of the proofs.

The auditor is directed that the defendant be charged as representing a reasonable compensation for his use and occupation of the property in question, the annual general taxes, and also one
269 or two per cent. per annum upon the market value of the property to be fixed by the auditor.

The defendant has established the payment by him of all the general taxes accruing upon this property during the period of his use & occupation.

The evidence submitted in this reference is far from uniform as to the market value of this property during the period in question. I have, however, endeavored to gather from all the proof such a fair & liberal valuation as would represent a basis upon which an allowance to the plaintiff in the nature of compensation for his loss by reason of the defendant's use and occupation could be made, and I have been the more liberal in this valuation for the reason that I have selected the minimum rate or percentage named in the order of reference. This valuation and allowance are shown in Schedule B. On consideration of the fact that defendant, although depriving the plaintiff of the use of the property in controversy, did not himself desire any substantial benefit from the said property, except such as he is required to account for in this proceeding, and in view of the fact that my valuation of the property from year to year is largely in excess of the assessed valuation, as well as for other reasons appearing on the proof of this cause, I think the allowance of one per cent. per annum, as stated in this account, is a fair & equitable remuneration to the plaintiff and an ample punishment for the defendant.

The order of reference further directs that the defendant
270 should be allowed all general taxes paid by him prior to his occupation, with interest; all special taxes, whenever paid by him, with interest, and with certain expenditures in defending the title, with interest. An account of these taxes and assessments and expenditures, together with the interest upon the same, calculated to the 1st of Nov., 1866, will be found in Schedule A. I have included in this schedule only such items as are satis-torily proved to have been paid by the defendant.

In Schedule C I have stated an account of the application of the charges against the defendant, according to the directions of the decree, bringing this account to the 15th April, 1878, the period at which defendant's use and occupation terminated. From the balance at that time remaining due to the defendant and unpaid, I have deducted the costs in this cause, as taxed by the clerk up to and exclusive of the proceedings before Auditor Hood.

With reference to the moneys collected by the defendant from the Government of the United States for the occupation of this property between the years 1861 and 1865, it is claimed by the plaintiff that

the defendant should be charged with the receipt of this money as of the year 1865, upon the ground that it could have been collected at the time, had not the plaintiff been prevented from such collection by the unlawful claim of the defendant.

Several documents are filed by the plaintiff tending to show
271 as far as they may be competent for that purpose, that payments were made by the Government as early as the year 1865, for the occupation of property in this District. Leaving out of the question the objection to form of this proof, I do not think the plaintiff has established such negligence on the part of the defendant in the prosecution and collection of this claim as to authorize a charge against the defendant of interest upon the amount for a number of years prior to its actual receipt. On the contrary, it appears that the prosecution of this claim was attended with considerable difficulty, and involved a large amount of correspondence with the several departments having jurisdiction of such matters, and lasting for a considerable period of time.

The defendant, on the other hand, shows that in the collection of this claim, he found it necessary to employ the services of an agent, and to pay a liberal portion of the amount realized as compensation for such service; that this should be taken into the account, and the defendant charged only with the nett sum received by him after the deduction of such attorney's fees.

Under my construction of the directions contained in the order of reference, I do not think I am warranted in adopting this theory of the defendant. In the report of Auditor Hood, the defendant was charged with the full amount paid by the Government, and this charge of the full amount, without deduction for the fees paid
272 to the agent or attorney, formed the subject-matter of one of the exceptions of the defendant to the said report.

The fact that, in the reference of this cause to the auditor with numerous specific directions as to the statement of the account, there is no direction as to this particular matter, seems to me to indicate the intention of the court that the defendant should be charged with the whole amount paid by the Government.

It is claimed by the defendant that this account of charges against the defendant for use and occupation should not be taken with rests; that is to say, the defendant should not be charged, either directly or indirectly, with interest upon the amount allowed for his use and occupation. Numerous authorities are cited in support of the argument that the auditor or master has no power to so state the account without direction from the court, and it is asserted that neither the Supreme Court of the United States or this court has given such direction.

I think this question is definitely settled by the language of the decree of reference, which in terms directs that the auditor shall apply the charges against the defendant when accruing in a given order, which order I have strictly followed in this account.

By the order of reference, the auditor to fix a reasonable fee for the services of the former auditor, Thomas Hood, Esq'r, herein, and report the same to the court.

After concluding the inquiry upon the other matters of ref-
273 erence, I notified the said late Auditor Hood, as well as the parties to this cause, of my intention to enter upon this particular inquiry. I subsequently received from Judge Hood a communication, which I return herewith as an exhibit to this report, marked T. H., 1.

The said late auditor subsequently personally appeared before me and made an oral statement relative to the matter of the fee charged by him, substantially the same as that contained in the exhibit above referred to. The charge of the said late auditor consists of two branches, to wit, 34 days for the taking of testimony, and 33 days occupied in preparing schedules and report.

I find upon examination that during the investigation of this matter by Auditor Hood, there were sessions at which testimony was taken, or adjournments or continuances amounting to the number for which he makes charge. It does not distinctly appear that either of the said adjournments or continuances were the voluntary act of the said auditor, or that he was not prepared to receive and record the testimony at each of the sessions appointed for that purpose. I do not therefore feel authorized to say that the said auditor was not entitled to charge the ordinary rate for each of the said sessions. It is stated by the defendant that some of the appointments made by the auditor were changed before the arrival of the
274 date at which they had been fixed, and that therefore the time of the auditor was free and available for other engagements. There appears, however, in the auditor's record, to have been a regular meeting upon each of the occasions for which charge is made.

With reference to the other branch of the charge it is claimed by Judge Hood that the time specified, to wit, 33 days, counting three hours for each, was actually employed in the examination of the matters in issue in the reference to him, the questions and points made by counsel, and the authorities to which they referred. He states that the record or memorandum of such employment kept by him has been lost or mislaid, and he is unable at — time to refer to the same. The plaintiff has exhibited to the auditor a portion of the briefs or statements used by him in the former records as serving to show in part the labor imposed upon the former auditor.

Other than this there is no proof on which I can base an estimate of the services rendered & their value, and I am reluctant to fix any other sum than that charged by the auditor who performed the service, while unable to give satisfactory reasons for such a charge.

I therefore respectfully request to be relieved from further inquiry in this particular matter.

(Sig'ed) JAMES G. PAYNE, *Auditor.*

Auditor's fee, ——.
June 1, 1881.

* * * * * * *

280 WEDNESDAY, *May* 18, 1881.

Hearing pursuant to notice.

Present: Mr. Peugh in person; Mr. H. E. Davis, for defendant.

Mr. Peugh submits the transcript of the costs in this cause, as taxed by the clerk, up to the 4th Nov., 1879, which transcript is filed as an exhibit to the report of the auditor (Thos. Hood) of the 21st Feb'y, 1880.

Mr. Davis objects to the transcript, as not being in accordance with the decree of the court.

The auditor submits to the counsel & parties present a communication received from the late auditor (Thomas Hood) touching the matter of the fees charged by him for his audit in this cause, and the communication is filed & marked Exhibit T. H., No. 1.

Counsel for the defendant calls the attention of the auditor
281 to the exceptions filed to the said charge of the auditor, & also to the record of the proceedings had in this cause before the said auditor.

The plaintiff submits the matter of the said auditor's fee without argument, and thereupon this matter is submitted on both sides.

282 THURSDAY, *November* 18, '80.

Met pursuant to notice.

Present: Mr. H. E. Davis, for defendant; Mr. Peugh present in person.

JAMES N. CALLAN sworn and examined:

By Mr. PEUGH:

Q. How long have you resided in Washington?

A. Over 42 years.

Q. Have you or have you not been engaged in the purchase and sale of real estate; and, if so, in what part of the city?

A. Well, I have purchased some real estate in the northeastern section of the city.

Q. Have you sold property in that portion of the city?

A. I have sold four squares that I purchased in the northeastern part of the city.

Q. Will you please name them?

A. I sold square 829, 856, 909, & north of 931.

Q. Between what streets does square 856 lie?

A. Between K & L & 6th & 7 streets northeast.

Q. You say you have sold in square 856; at what price did you sell that portion of square 856 which lies on K street?

A. The property I sold on K street, which I sold ten years ago, averaged me about twenty cents a foot.

283 Q. About ten years ago?

A. About ten years ago, between 1869 and 1870.

Q. What were the highest figures you got for land on K street?

A. Twenty-five cents a foot.

Q. Did you sell any ground in the said squares at a higher price than 25 cts.?

A. No, sir.
Q. Between what streets is square 829?
A. Between L and M and 5th & 6th streets.
Q. Did you sell ground in square 829?
A. Yes, sir; the whole of it.
Q. What was the highest price you sold ground for there?
A. Subdivision 11 I sold at 25c. per square foot.
Q. Have you made any sales recently in that section of the city?
A. No, sir; I have not; not for some time.
Q. Do you know the position of squares 910 & 911?
A. Yes, sir; very well.
Q. Please state them.
A. 911 is between H & I, and 910 between I & K.
Q. What would you consider, in your experience, comparatively the difference in value between square 910 and 856?
A. I would think that square 910 was worth about as much money as square 856?
Q. What would you think of square 911 as compared in value with *with* 910?
A. I regard 911 as of more value than 910.
Q. Why would you think 911 of more value than 910?
A. Because of the situation; being on a paved street & horse cars going by.

284 Q. Do you know anything of sales in square 933, between 9th & 10th and H and I, immediately east of square 911?
A. I know what I have heard of the sales there.
Q. What do you know of sales in square 932, which lies immediately east of 911?
A. Only what I have heard.
Q. Did you make any arrangement in regard to sale of land in either one of these squares?
A. In one of them I had; I am not sure whether it was 932 or 933.
Q. Do you remember the prices at which the sale you made in either — these square-, 932 or 933, according as your memory may be refreshed as to which you made sale?
A. I cannot, sir; I am not able to fix my mind on which square, or what the terms were; my recollection is indistinct about that sale.

Cross-examination by Mr. DAVIS:

Q. How long have you dealt in property in the northeast section of the city?
A. About 22 years.
Q. From when to when?
A. From about 1858 to 1871.
Q. When did you buy square 829?
A. I am under the impression that I bought it in 1868.
Q. For what price?
A. About 12½c. a foot.
Q. Are you sure of that?

A. That is to the best of my recollection.

285 Q. When did you buy square No. 856?

A. I bought 829 previous to 856.

Q. Did you buy all of square 856?

A. Yes, sir.

Q. What did you pay for square 856?

A. At about the same rate.

Q. And bought it at the same time?

A. I bought 856 after 829.

Q. How long after?

A. Well, maybe six or seven months.

Q. Do you own square 909?

A. No, sir; I sold it some years ago.

Q. When?

A. I think I sold it about 19 years ago.

Q. To whom?

A. I am under the impression the man's name was Masters.

Q. At what price?

A. That I don't recollect.

Q. Do you know when you bought square 909?

A. About 1858.

Q. At what price?

A. Between five & six cents a foot.

Q. Do you own square north of 931?

A. No, sir; I sold that about 19 years ago.

Q. To whom?

A. To a man named Mangan.

Q. At what price?

A. I don't recollect the price.

286 Q. On what terms did you generally sell these squares?

A. Square 909 I traded for a house on 10th street. I generally sold upon small cash payments and notes payable monthly.

Q. You don't remember the price you paid for square north of square 931?

A. No, sir; I don't recollect, but I think between five & six cts.

Q. You speak of selling your property on K street in 1869 or 1870 at an average of twenty cents a foot; how much of it did you sell at that average?

A. Well, I should suppose about 100 front feet.

Q. You sold it in lots?

A. Yes, sir; I subdivided the square into 80 lots.

Q. And sold it in lots?

A. Yes, sir.

Q. You say you sold subdivision 11 in square 829; when?

A. In 1869, I think, sir.

Q. Where is subdivision 11 in that square?

A. Fifth and 8th streets, northeast.

Q. Where was the hundred square feet east, in square 856?

A. They were on the east half of the square, between 6th & 7th streets.

Q. Were not the sales made by you for the purpose of developing the property by the purchasers?

A. In nearly every case the purchaser bought for the purpose of improving; nearly every case.

Redirect, by Mr. PEUGH:

Q. Mr. Callan, did you or not sell the whole of the front on K street? I understood you to say that you sold the whole of the front on square 856.

287 A. No, sir; I only sold some few lots there.

Mr. Davis files with the auditor a statement of account made by defendant in accordance with the decree of the fifth November, 1880.

Adjourned until Monday, at 2 o'clock, November 22d, 1880.

MONDAY, *November* 22, 1880.

Met pursuant to adjournment.

Present: Mr. Peugh in person; Mr. H. E. Davis for the defendant.

JAMES N. CALLAN recalled:

By Mr. PEUGH:

Q. Mr. Callan, you have stated that you purchased square 909 about 1858, and sold out in 1859 or 1860 for six cts. per foot; do you consider square 909 of as much value as square 910?

A. No, sir; I think not.

Q. Why do you not?

A. Square 909 is cut diagonally in half by the Baltimore and Ohio Railroad Company running through it from corner to corner.

Q. You have stated that you bought squares 829 & 856, about the year 1868 or 1869, at about 12 cents per foot, and that you sold a large portion of square 856, lying on K street, at an average of about twenty cents a foot about the year 1870 or 1871; have you kept yourself acquainted with the value of this species of property in that vicinity since the sales of squares 829 and 856?

288 A. To a small extent.

Q. Taking your experience in the sales of these two squares in 1870 or 1871 as a criterion, could you not have sold squares 910 and 911 in the same manner as you sold squares 829 & 856?

(Objected to, & objection sustained.)

Q. From your experience in handling property adjacent to the squares in question, what would you have considered a fair salable value, giving the separate value of each square from 1865 to 1870 or 1871?

(Question objected to, & objection sustained.)

Q. Are you able to fix a value from your experience in the sale of the adjacent squares?

A. I am able to fix an approximate value for square 911.

Q. What would that value be?

A. I should that 911 is worth at that time, between the years 1865

to 1870 or 1871, from 25 to 35 cts. per foot; I have no idea what is the value of 910.

Q. Would you be willing to state a comparative value between these squares?

A. My opinion is that 911 during those years would average from five to ten cents a foot more in value than 910.

Q. Have any improvements been made in that portion of the city of a public character at or about 1871 or 1872?

A. Putting down the Columbia street railroad about 1871 enhances the value of property along its line.

Q. What was the effect of location of this railroad to the adjoining property, and how far did it extend?

A. It enhances the value in the neighborhood where it went through; maybe two or three squares each side of the road.

289 I sold lots on K street, and this railroad was on H. I consider it enhanced the value of my lots on K, and in square 856.

Q. Has your familiarity of the value of ground in the vicinity of squares 910 and 911 continued up to 1878?

A. To some extent. I don't remember making any sales in these between 1875 and 1878, in that neighborhood.

Q. Would these squares bring as much in 1878 as at any anterior period?

A. I think property was higher in 1875 than it has been in that neighborhood since.

Q. How much do you think they depreciated from 1875 to 1878?

A. I have known lots there to depreciate from two & a half to five cents a foot from what they were selling for in 1875.

Q. Are the squares surrounding these two squares built upon?

A. I believe the squares adjacent to 911 are built upon. I don't know about 910.

Cross-examination by Mr. DAVIS:

Q. What is your occupation?

A. I am a dealer in real estate.

Q. How long have you been so engaged?

A. I have been buying real estate ever since I was 18 years old.

Q. What experience have you had in dealing in property in that neighborhood between the years 1865 and the early part of 1878?

A. Well, I had no experience from 1865 to 1868. In 1868 I commenced to purchase for the second time. I commenced to

290 purchase in 1868, and dealt for three years altogether in that neighborhood.

Q. Then your experience in dealing in property in that neighborhood is confined between the years 1868 & 1871?

A. Yes, sir; I dealt very largely in it at that time. Since that time I have had but small transactions.

Q. Then your experience from 1871 to 1878 has been comparatively insignificant?

A. Very small, sir.

Q. Are you familiar with the assessments upon property in that neighborhood from 1865 to 1878?

A. No; I don't know that I paid much attention to them.

Q. Then you do not know in what rates the assessed value of property there (where?) during that time stood to the real value?

A. I do not.

Q. What effect, if any, had the panic of 1873 upon the market value of unimproved property in that vicinity so far as your experience goes?

A. My experience goes to show that the property had depreciated there in the last five years. Has depreciated, as I stated before, from 2½ to five cents a foot on the vacant lots.

Q. Was not the market value of property of this description at the time I have indicated at its height, at about the time of this panic, say the years 1872 or 1873?

A. I think that real estate in that locality was at its height from 1871 to 1875.

Q. Didn't the panic, creating a stringency in the money market, make itself more severely felt with respect to investments in this class of property than any other?

A. Well, I never dealt much in improved property & could not say.

291 Q. Did it not have a bad effect on investments?

A. It did. About 1874 or 1875 property commenced to depreciate; it depreciated very much.

Q. Did not the depreciation, in fact, commence to be very noticeable in 1874?

A. I don't know about 1874, but I recollect in 1875 I found property that had been selling for twenty-five cents come down to twenty cents, and other property that had been selling for 18c. come down to 12½c.

Q. Was there much market for property of this description from 1875, as you say, up to 1878?

A. Very little.

Q. How do you fix the value of square 911 at from twenty-five to thirty-five cents a foot at the time you named?

A. I fixed the value of it at what I could have sold it for at that time.

Q. What do you mean by that?

A. I mean if it had been my property I could have got from twenty-five to thirty-five cents a foot for it in toto.

Q. How do you know that?

A. I know what it was selling for and what I was getting for it in 1869 and 1871.

Q. Then, I understand that, had you the handling of square 911, you could have sold it in lots to suit purchasers at that rate?

A. Yes, sir.

Q. Upon what terms?

A. Small cash payments and time for the balance.

JAS. N. CALLAN.

Mr. Davis, for the defendant, files a correction of the statement of account heretofore filed by him with the auditor. This paper is marked Exhibit —.

292 FRANCIS H. SMITH, sworn and examined by Mr. PEUGH:

Q. You may state your residence and occupation.

A. I reside in Washington, and am a real estate broker.

Q. How long have you been in the business?

A. About three years.

Q. Are you familiar with the value of real estate in the north-eastern part of the city; say 6th, 7th, 8th, 9th, & 10th streets east, and H street north, or its vicinity, and how long?

A. I have had quite a number of individual transactions in property in that portion of the city going back for 15 or 20 years.

Q. Do you know the localities of square 910 and 911 in the city of Washington?

A. You would have to designate the locality by streets.

Q. Bounded by H street on the south, K street on the north, 9th street on the east, and 8th street on the west.

A. Yes, sir; I am familiar with that.

Q. You know the locality?

A. Yes, sir.

Q. Are there any improvements around them or not?

A. Yes, sir; on the square west between H and I, and on the opposite side of H street; that is my recollection.

Q. What estimate of market value, from your knowledge, would you have placed upon these squares as indicated in your former answer, beginning in 1865 and running down to 1878, estimating each square separately in each year between those periods, if you can?

293 A. I don't think I could give the relative value with any exactness, or at least any material change from year to year; property from 1865 to 1872 appreciated in value & after 1872, and between that and 1878, either held its own or depreciated; I cannot designate the years; I made a contract to purchase the squares immediately east of those two squares; it was between 1865 and 1870, which was not finally consummated because of a flaw in the title; my recollection is that it was fifteen cts. a foot for the two squares; property at that time, in that locality fronting on H street sold very readily for twenty-five cents a foot in separate lots; the price growing less as you go north and for about 12 or 15 cents a foot.

Q. For the northern square?

A. Yes, sir.

Q. Is there a street railroad running south of square 911?

A. The Columbia railroad runs along H street.

Q. What effect did that railroad have on the values?

A. Any improvement of that sort appreciates the value of real estate in its immediate proximity.

Q. Has there been any buildings erected at, near, or around these squares or east of them since 1870?

A. Yes, sir.

Q. When were those buildings erected?

A. I cannot, from recollection, give you the exact dates in details; I should say that on the squares adjoining from 20 to 50 houses have been built since that time; that is the roughest sort of a statement; if I went out there I could give you better information.

294 Q. What effect, if any, did that have in enhancing the value of those squares, 910 & 911?

A. The natural inevitable effect of building houses of a fair grade for the locality is to increase the value of real estate in the vicinity.

Cross-examination by Mr. DAVIS:

Q. You say you are a real estate broker?

A. Yes, sir.

Q. Have you been engaged in that occupation alone or *or* in association?

A. Alone.

Q. As I understand, you have been engaged in other occupations for three years?

A. Yes, sir.

Q. What experience prior to that time did you have with respect to dealing in property in this section of the city?

A. As a private individual I bought and sold for the purpose of speculation and paid considerable attention, and made considerable inquiries as to the value of real estate in that vicinity.

Q. Are you familiar with the assessment on property in that neighborhood from 1865 to 1878?

A. In that immediate vicinity I don't know that I can state it; I did know the assessment of these squares & the adjoining squares which I negotiated for at the time, but I cannot state them now from recollection.

295 Q. Did not the panic of 1873, occasioning a stringency in the money market, seriously affect property of the description of these squares?

A. Yes, sir.

Q. I understood you to say that the value of property of this description in that vicinity reached its height in 1872?

A. Yes, sir.

Q. From that time to 1878 was there not a marked depreciation in its value?

A. About the same condition. The improvements and the erection of buildings in the neighborhood to a certain extent would counterbalance the depreciation.

Q. Did not investment in property of that sort receive a decided check as one of the results of that panic?

A. Yes, sir; at the same time a considerable number of persons who built largely for the purpose of speculation continued to purchase and to build for that purpose. The investments in unimproved real estate was made more largely by these persons than anybody else.

Q. That is, persons engaged in speculations?

A. Persons who bought real estate in tracts of considerable size for the purpose of building blocks of houses.

Q. Do you know how these speculations resulted generally?

A. Generally badly to the parties investing.

Redirect, by Mr. PEUGH:

Q. Do not the improvements, both public and private, cause the value of property to remain *in statuo quo*, notwithstanding the
296 general depreciation in the city; that is, the public improvements before the panic and the private improvements since the panic?

A. The condition of the real estate market remaining the same, the public and private improvements would inevitably have enhanced the value of property considerably.

Q. Instead of depreciating?

A. Instead of depreciating. My impression is that in that particular locality one just about counterbalanced the other. There was very material depreciation in the value of property remaining in the same condition; but, at the same time, my impression is that the improvements made in that vicinity continued the actual market value about the same.

FRANCIS H. SMITH.

Adjourned until Wednesday, at 3 o'clock.

WEDNESDAY, *Nov.* 24, 1880.

Having — pursuant to adjournment, at the request of Mr. Peugh, the hearing is further adjourned to Friday, Nov. 26, at 3 o'clock p. m.

FRIDAY, *November 26th*, 1880—at 3 o'clock p. m.

Met pursuant to adjournment.

Present: Mr. Peugh, the complainant; Mr. H. E. Davis appears for the defendant Davis.

MOSES KELLEY sworn:

By Mr. PEUGH:

Q. You are a resident of Washington?

A. Yes, sir; and have been here pretty near forty years.

Q. Mr. Kelley, have you, or have you not, been engaged in the purchase and improvement of real estate in the city of Washington?

297 A. Yes, sir; I think to some extent.

Q. How long, sir?

A. A good many years; I can hardly tell how long.

Q. Do you know the locality of squares 910 & 911 according to the plan of the city of Washington?

A. I do.

Q. Have you any knowledge as to the value of square 911 at any period of time between 1865 and 1878, and at what period of time?

A. I think in the spring of 1873 I wanted to purchase that square,

made application to purchase it, and would have been willing to purchase it at 25 cts. a foot, the same as had been paid for the square on the west of it.

Q. Has your knowledge of the probable value of that square continued from the period of time indicated down to and including the year 1878?

A. I have been sick for the last four years, and have not noticed the value.

Q. During that whole period were the adjacent squares improved by residences?

A. I think the squares facing on three fronts, east and south and west, were entirely or nearly so improved.

Q. What character of improvements?

A. Dwelling-houses principally.

Cross-examination.

By Mr. DAVIS:

Q. This property is unimproved, I believe?

A. I believe entirely, sir.

298 Q. It is located rather away from the business centre of the city?

A. Yes, sir; it certainly is.

Q. Then at what period of time from 1865 to 1878 was it available for business purposes?

A. Well, I thought in 1873 that the south front of it was available for business purposes in consequence of the large number of dwellings that had been built up around it.

Q. And you made application to purchase of whom?

A. If I recollect aright, of Mr. Peugh himself. I made application through Wilson E. Brown to Mr. Davis, and the answer was that the matter was in litigation, and no proposition would be received.

Q. That was the answer Mr. Brown gave you?

A. Yes, sir.

Q. You say that the square west of 911 was sold for twenty-five cents a foot?

A. Yes, sir.

Q. When and to whom?

A. I am not quite clear, but I think in the spring of 1873 it was purchased by my son and Mr. Cate & Mr. Chappell; I think the deed was to my son; it was a joint operation.

Q. Do you remember the result of that investment?

A. At the time it was thought to be a decided success, but since then changes of such a character have occurred as to make it certainly otherwise.

Q. It was in fact disastrous, was it not?

A. As matters now stand, it has been disastrous.

Q. Have you been familiar, Mr. Kelley, with the assessment

299 of this property in question, squares 910 & 911, from 1865 to 1878?

A. I have not.

Q. The market price of property of this kind in that locality was at its height in the fall of 1872 & spring of 1873, was it not?

A. Well, I would say in the spring of 1873.

Q. Now, didn't the panic of 1873, occasioning a stringency in the money market, more seriously affect property of this description than any other—I mean with respect to its marketability?

A. I thing not; I think after that, perhaps, in 1874 & 1875, a good many buildings were put up in that neighborhood, mostly of a small classs for dwellings, and I think the demand for some time after was very fair; but the panic of 1873 affected all property in the city. Since then, of course, sales have not been so ready.

Q. Do you not think that the effect of the panic was more marked upon unimproved, unrented, and unremunerative property than upon any other kind in general—I mean throughout the city?

A. I hardly think it was. There was a good deal of building. There was a good [deal] of building carried on by builders in the way of trade, and I think they preferred unimproved property to improved. I think unimproved property held its own better than improved property.

300 Then you think that this species of improvement was so great as to counterbalance the effects of the panic on property of this sort?

A. For a time, I think.

Q. Now, what sort of a market was there for property of that description in that locality from, say the fall of 1874 to the spring of 1878?

A. That I could not tell you. I could not tell you anything that I know of that I could rely on myself prior to the fall of 1876. About four years ago I had a fall, which shattered me very much, and from that time I hardly know what has been done. Prior to that time, between 1873 and 1876, the market was very fair, according to my recollection.

Q. Investments in that neighborhood, I believe, eventually were unfortunate?

A. Well, so far as I am concerned, they have been, certainly.

Redirect, by Mr. PEUGH:

Q. Was there any local circumstances occurring from 1873 to 1878, or up to that period of time, of which you have had observation, that kept the price of property in that neighborhood, at least what it had been for years, if not better, improvements in the way of tenantable houses and the street railroad?

A. I think the value of unimproved property from 1873 to 1876 was greatly enhanced by the improvement of property in that neighborhood.

MOSES KELLY.

301 FREDERICK W. JONES, — and examined, states: That he is a resident of the District of Columbia, and a member of the bar.

By Mr. PEUGH:

Q. Are you familiar with the location of squares 910 & 911 in the city of Washington?

A. If they are between H & K & 8th & 9th northeast, I am.

Q. Did you buy or sell for others any ground in that vicinity between 1865 and 1878?

A. I sold square 932, which is immediately east of one of these squares, in the month of April, 1875.

Q. At what price did you sell them, or did you sell the whole square or sell it in parcels?

A. I sold the whole square, but one part, and the most valuable part, to Moses Kelley, and the other to Henry A. Willard.

Q. At what prices respectively?

A. To Moses Kelley, 18,701 feet, at 24 cts. a foot, and 51,336 feet to Henry A. Willard at 16 c. a foot; the difference in price was because the part that Mr. Kelly bought was the southeastern corner and was on a street that had been graded, and it was one square nearer the street railway than the rest of the square.

Q. How is square 910, which is situated directly west of square 932, compare in value with square 932?

A. It is worth a little more, being nearer the centre of the city.

Q. How much per cent. more would you say?

A. Oh, I suppose anywhere from 8 to 10 or 12 per cent.

Q. Would you say ten per cent?

A. I would say about ten per cent., because I think the
302 street is graded there; that would add to its value, and then it is one square nearer the centre of the city; there would be the same difference there is between the square between 4½ and 3d street, and 4½ & 6th st.

Cross-examination by Mr. DAVIS:

Q. Did you own square 932?

A. No, sir; I sold it as trustee.

Q. Have [you] had any other experience in property in that section of the city except with respect to that square?

A. I do not know that I have.

Q. Who were the beneficiaries of your trust?

A. John Van Riswick got the benefit of the sale, George Sanckton was one, but I cannot recollect; the deeds will show.

F. W. JONES.

Adjourned until Thursday afternoon at two o'cl'k, December 2, 1880.

THURSDAY, *December* 2, 1880, at 2 o'clock.

Met pursuant to adjournment.

SAYLES J. BOWEN, sworn and examined:

By Mr. PEUGH:

Q. I believe, Mr. Bowen, you have been mayor of the city of Washington?

A. I was, sir, from June, 1868, to June, 1870.

Q. Have you been the owner of any property in the northeastern part of the city?

A. I have been and am still owner of square 674 north and east of the Capitol; a large square containing 256,000 feet of
303 ground; I have owned it from 1851 down to the present time.

Q. Are you familiar in your judgment with the value of *of* property between K and H streets, and between 8th & 9th east, and in that locality?

A. Well, I have been more or less acquainted with it for many years. For quite a number of years I was a pretty large dealer in real estate, buying & selling. That was before I was mayor, however. From that time I have bought little and sold little. There has not been a great deal of demand, especially from 1873 down to the present time, for lots that are out like those.

Q. Then, have you kept yourself informed as to the value of property in the locality I have indicated?

A. Well, pretty well. Perhaps I would not know exactly what property would bring from year to year, but I could give a very good estimate, if brought into market, what it was worth.

Q. You have stated that you know the locality of property between H & K & 8th & 9th streets east; the squares to which I refer are squares 910 and 911?

A. They must be out there adjoining where Mr. Kelley made those many improvements.

Q. What estimate of value would you fix upon square 910 from 1865 to 1871, and from 1872 or 1873, per foot?

A. I cannot state which square fronts on H and which on K. I should regard the frontage on H & K streets as being more valuable than that which would front on I street, or that fronting on any of the cross streets.

304 Q. What would you estimate, since you have taken square 911, of the square taken as the whole of the one on H street, from 1865 to 1871, or 1872?

A. I should think that the half of the square fronting on H street would have brought at that time from twenty-five to thirty cents, and that fronting on K street worth as much; that being a wide street, and, in my opinion, will be one of the principal thoroughfares in Washington. I have always supposed that that would be one of the principal thoroughfares of Washington. I own property there, and my opinion might be considered prejudicial. I was going to remark that the other squares, the other part, ought to be worth from twenty to twenty-five cents. I do not speak of it from 1873 down to the present time, because property has declined pretty much in all parts of the city down to this time—commencing at 1873 and running down to a year past. I speak of it up to about that time.

Q. From 1865 up to 1878 is the time I am limited, but I am asking you from 1865 to 1871, or 1872?

A. I think the prices I have named would have been an average price at those times.

SAYLES J. BOWEN.

Adjourned until Monday, December 6, 1880, at 2 o'clock.

MONDAY, *December* 6, 1880.

Hearing pursuant to adjournment.

Present: Mr. Davis.

At the request of Mr. Peugh, in writing, the hearing was adjourned subject to notice.

305 MONDAY, *December* 13, 1880—at 3 o'clock p. m.

Hearing pursuant to notice.

Present: Mr. Peugh, the complainant; Mr. H. E. Davis, for the defendant.

J. C. MCKELDEN sworn and examined.

By Mr. PEUGH:

Q. State your residence.

A. I am a resident of Washington.

Q. I believe you have been and are the owner of some real estate in this city?

A. Yes, sir.

Q. Improved and unimproved?

A. Yes, sir; both.

Q. Do you know the location of squares 910 & 911, and have you seen them?

A. Yes, sir; they are the squares between 8th & 9th & H & K. Building that railroad there, of course I noticed all the property in that neighborhood.

Q. There is a street railroad on H street?

A. Yes, sir; I built it.

Q. In what year did Congress grant the charter, do you remember?

A. It was either in 1871 or 1872; perhaps it was in 1871. We did not start the road until June, 1872.

Q. When was the road commenced?

A. In 1872, and finished early in 1873.

Q. When did it commence running its cars?

A. The first cars run on the 13th day of August, 1872.

Q. Who was its first president?

A. I was.

306 Q. Did the locating of the street property (railroad?) have any effect on the value of property on its line or adjacent to it?

A. I can only speak from heresay on that question. I have no doubt it did, largely. I don't know of my own knowledge—only by hearsay. I will say further, as it just occurs to me, that I bought a large piece of ground on the extreme end of H street myself shortly after the road was built.

Q. What did you pay for it per foot?

A. It was a singularly shaped piece of ground. I paid 12½ cents for it; but I sold it soon afterwards for more than twenty-five.

Q. Have you any opinion, from experience or otherwise, of the rental value as to the per cent. that unimproved real estate should command in this city upon its market value?

(Objected to.)

A. I have had only one single case of experience in that matter. I have leased only one lot of ground.

Q. Money being the representative of value, should not ten thousand dollars' worth of real estate convertable into money at that value, in your opinion, command the lawful per cent. that $10,000 in money would command?

Objected to; objection sustained.

Q. I will ask you whether this lot which you leased, if the price was fixed by yourself, the price at which you consented to rent it?

A. It was agreed upon mutually between myself & the lessee.

Q. If you were deprived of the use of any amount of money or property held wrongfully by another, what would, as a rea-
307 sonable recompense for its unlawful detention, be regarded by you?

(Objected to, and objection sustained; exception noted.)

Q. Would you, or would you not, consider six p'r ct., over and above all costs, should be allowed you?

Objected to; objection sustained; exception noted.

Cross-examination waived.

Adjourned subject to notice.

JOHN C. McKELDEN.

FRIDAY, *Dec.* 17, 1880—at 3 o'clock p. m.

Met pursuant to notice.

Present: Mr. Peugh, in person; Mr. H. E. Davis, for the defendant.

F. C. CATE,

By Mr. PEUGH:

Q. State your occupation and residence.

A. Clerk in the office of Comptroller of Currency; resides in Washington.

Q. Are you familiar with the location of squares 910 & 911 in the city of Washington?

A. I am.

Q. Are they eligible squares?

A. They are.

Q. How long have you known them?

A. My attention was particularly called to them in 1872.

Q. What estimate of value would you have fixed upon them, separately, in 1872?

A. I was prepared to offer thirty cents a foot for square 911, and twenty-five c. for 910.

308 Q. Did you propose to build upon them?

A. Yes, sir; that was my object.

Q. Were you or not engaged in the purchase of property & the construction of houses in the city of Washington?

A. Yes, sir.

Q. In what locality?

A. The square opposite that, and the two squares bordering on that one west, and two south—four squares.

Q. Then, you had fixed your estimate of value from actual experience?

A. I have fixed no estimate of value; that is what I would have been willing to pay at that time. I was buying squares in that neighborhood.

Q. Did you rent any of the property you purchased in that neighborhood?

A. I sold all my property; I don't think I rented any property at that time.

Q. Do you continue this estimate of value down to 1878, or to what period of time?

A. I don't continue that value to 1878 by a great deal.

Q. Did you offer to purchase these lots of me about the year, or in the year, 1876, at the prices named by you?

A. No, sir; not for the prices named in 1872.

Q. Do you remember the prices at which you offered to purchase them at that period of time in 1876?

A. I was not in a condition to purchase in 1876; I was authorized by parties to purchase those squares, if I could, at a much less figure than that.

Q. Do you remember what it was?

309 A. I think it was eighteen & twenty cents a foot; eighteen for the north square and twenty for the south. My attention has not been called to it for a great many years, and I may have made a mistake in these prices; I think not, however, because I was in a company that bought the square right opposite—west of it—on which I live now. I don't remember whether I paid 20 or 25 cts. a foot.

Cross-examination:

By Mr. Davis:

Q. You say you were prepared to offer in 1872 certain rates per foot for squares 910 & 911; how long were you so prepared?

A. I do not know, sir, how long; I made up my mind to purchase them, and took the necessary steps in that direction, and found I could not get them.

Q. Did you make an offer to any person at that rate?

A. No, sir; I made no offer at all when I found they were not purchaseable.

Q. Was not the value of property in that neighborhood at its height about the year 1872?

A. 1872 & 1873, yes, sir.

Q. And from that time until 1872 was there not a marked depreciation of the value of property in that locality?

A. Yes, sir.

Q. Was there not, in point of fact, little or no market for property of the description of squares 910 & 911 in that locality, from the year 1873 to the spring of 1878?

A. Yes, sir.

Q. You say you bought property west of 911 in company
310 with Mr. Kelley, was any one else engaged with you in that purchase?

A. Yes, sir; Mr. Chappell.

Q. At what rate did you purchase that property?

A. Well, sir, I cannot exactly remember; from twenty to twenty-five cents a foot.

Q. In what year?

A. In 1873.

Q. How did that investment result?

A. As real estate investments all did at that time, disastrously.

F. C. CATE.

S. J. BOWEN recalled:

By MR. PEUGH:

Q. You own property in the northeastern part of the city?

A. Yes, sir; I own a square of ground between North Capitol and First street east & L north, square 674.

Q. What per cent. on actual value would you consider a proper value for these squares, 910, 911, between H & K & 8th & 9th streets northeast?

A. I don't know that I could answer a question of that kind. It would depend entirely upon what the person would want the ground for.

Q. Suppose they wanted it for building purposes?

Objected to. Objection sustained.

Q. Are you able to state what percentage of the real value of property its rental value would be?

A. It is a question beyond my knowledge to answer. Of course, the owner has to pay a tax of one & a half per c't on its assessed
311 valuation; whether it is equal to the real valuation of it or not, is another thing. It might be assessed for more than it is worth, & it might be assessed for less. He might be paying one & a half per c't on an assessed valuation which is above its real valuation, or he might be paying one & a half per c't on an assessed value which is less than its real value.

Q. Suppose you were the owner of these two identical squares of ground and a party desired to rent them, what per cent. upon their actual value would you probably rent such property?

(Objected to. Objection sustained.)

Q. Are you able to state what the rental value of this property was between the years 1865 & 1878?

A. As I said before it would be impossible for me to fix upon it. It would depend entirely on the use the party want to put it to.

Q. Would six per cent. upon a lease of five or ten years upon its actual value be a reasonable compensation?

(Objected to. Objection sustained.)

Q. Suppose you were the owner of any unimproved real estate in the city & you were unlawfully deprived of its use, what would you consider a reasonable sum for its use and occupation thus withheld on its actual value?

(Objected to. Objection and exception noted.)

Cross-examination waived.

SAYLES J. BOWEN.

E. A. McINTYRE, sworn & examined:

By Mr. PEUGH:

Q. You- residence & vocation, if you please.

A. Washington; real estate broker.

312 Q. How long have you been thus engaged?

A. Actually for ten years.

Q. Do you know the localities of squares 910 & 911?

A. I do.

Q. You have known these squares how long?

A. Ever since I lived in Washington.

Q. What is your estimate of value on those two squares taken separately (per cent.) and per square foot from 1865 to the spring of 1878, inclusive?

A. During that time I should say the price varied. In the early part it would be worth from twenty-five cents to 30c. per square foot—thirty for the south and twenty-five for the north; and in 1878 they would be five cents less on each square.

Q. What would be the fair rental value of those squares from 1865 to 1870?

A. It is very rarely that unimproved property is rented. It would be difficult to state. I could only say what the Government has given for unimproved property.

Q. What would be your estimate of its rental value upon a lease of three, five, or eight or ten years during that period of time?

A. It ought to bear the same rate that the Government assigned—six per cent. on its assessed value.

Cross-examination by Mr. DAVIS:

Q. When was the Government paying this rate for unimproved property, such as that involved in this cause?

313 A. Up to about 1876.

Q. Do you know of any property in this neighborhood

rented by the Government, so late as 1876, at that rate—unimproved property?

A. No, I cannot say that; I do know of cases in the city of Washington.

Q. You say that you regarded this property as worth thirty cents in the early part of the time indicated in Mr. Peugh's question; please state that time a little more specifically, if you can.

A. About 1873.

Q. I ask you, Mr. McIntyre, if there was any demand for property of this character and in this neighborhood, between the years 1865 and the early part of 1872?

A. If I am not mistaken, all the new houses built there was built in that period.

Q. That is between 1865 and 1872?

A. Yes, sir; at the time Moses Kelley was building there.

Q. State, as nearly as you can, the exact time.

A. That would be impossible without looking at the records.

Q. Are you familiar with the assessed value of squares 910 & 911 from 1865 to the spring of 1878?

A. I never looked at the assessed value of either of those squares.

Q. Did-'t the panic of 1873, creating a stringency in the money market, cause a marked decline in the value of property of this description in that locality?

A. It had its effect in all localities.

Q. Did-'t it particularly affect investments in unimproved property in the locality indicated?

314 A. I cannot say that it did any more than anywhere else.

Q. Did it not have a greater effect upon investments in unimproved property than in property improved?

A. Yes, sir.

Q. Was there any market for property of this description in the locality indicated from 1873 to 1878?

A. There was never any great demand for squares. But within the past two years I have had an offer — that property.

Q. Was not the value of property of that description in that locality at its heighth in the fall of 1872 and the spring of 1873?

A. I am not able to state so specifically as that.

Q. Well about that time?

A. That was somewhere about the period that Moses Kelley was building there, and that was about the time property was at its height.

Q. Did-'t the improvements and investments of Moses Kelley tend largely to give property of this description in that locality its abnormal value at that time?

A. It had its effect. The erection of a number of houses in any one place would have its effect on the price of the squares.

JOHN VAN RISWICK, sworn and examined:

By Mr. PEUGH:

Q. Are you not the owner of a considerable amount of property in the city of Washington?

A. I am, sir.

Q. Are you the owner of any unimproved real estate in the city of Washington?

A. Yes, sir.

315 Q. What would you consider a proper rental value on unimproved real estate, or what per cent. on actual value, a reasonable rent by the year—two, four, six, eight, or ten years?

(Objected to; objection over-ruled.)

A. The only way that I could come at that would be to say that to invest money in unimproved property I would not do it unless it would pay me five per cent., clear of taxes—that I mean five per cent. upon its real cash value.

Cross-examination, by Mr. DAVIS:

Q. In making investments in unimproved outlying real estate, does the investor look for remuneration from the rental of such property, or does he not rather look to holding it until a rise in its value, for the purpose of realizing upon his investment?

A. The latter, I believe, is generally the case, although the former may sometimes have its effect.

Mr. Peugh presents and, with the assent of counsel for the defendant, files with the auditor a certificate of Robert P. Dodge, treasurer & assessor of the District of Columbia, showing that square 910 contains 76,850 square feet of ground, and that square 911 contains 78,860 square feet.

Adjourned, subject to notice.

WEDNESDAY, *Dec.* 22, 1880—3 o'clock.

Met pursuant to adjournment.

Present: Mr. Peugh, the complainant, & Mr. H. Davis, for the defendant.

HENRY P. VILES, sworn & examined:

316 Q. What is your occupation?

A. Clerk in the Quartermaster General's office.

Q. How long have you been a clerk there?

A. About 16 years.

Q. Of what do your duties consist?

A. I am the principal clerk of the barracks and quartermaster's branch.

Q. What species of claims, if any, come before you in your branch of the business?

A. Renting property & the construction of buildings; anything like that. We examine the property and submit the evidence for the action of the Quartermaster General; that is as far as we go.

Q. For rent of enclosed and unenclosed real estate in the city of Washington?

A. Yes, sir.

Q. Do you know that rents were paid for grounds enclosed by a fence in the city of Washington in the years 1865 and 1866?

A. Yes, sir.

Q. So far as your knowledge is concerned, the recommendations which are made by the Quartermaster General's Department, for which payments are made, do, or do not, these recommendations come back to him, in the form of a requisition, to be signed by the Quartermaster General, for the payment of such rents?

A. They come back in the form of a Treasury certificate, and we make our requisitions on these Treasury certificates.

Q. Then you have knowledge of the fact first of adjudi-
317 cating, as it were, the rental in those cases and a certificate coming back from the Treasury Department?

A. Yes, sir.

Q. If I remember rightly there was a period of time when the payment of rents ceased to be recommended by the Quartermaster's Department; do you know when that was, for enclosed city lots?

A. They allowed rent for enclosed property ever since I have been in the office up to 1873 or 1874, when Congress took away all authority.

HENRY P. VILES.

Cross-examination waived.

Adjourned until Tuesday, Dec. 28, 1880, at 3 o'clock.

PEUGH *vs.* DAVIS.

Assigned hearings in the cause.

DECEMBER 28, 1880.

Hearing pursuant to adjournment.

At the request of Mr. Peugh, the complainant, the further hearing of this cause is continued, subject to notice.

FEBRUARY 10, 1880 (1881?).

The hearing of this cause is further continued to the 14th, at 10.30.

FEBRUARY 14th, 1880 (1881?).

Hearing pursuant to adjournment.

The complainant, being present, files with the auditor a paper from the War Department of the U. S., purporting to be a certified copy of a letter from the Quartermaster General to Colonel D. H. Rucker, Quartermaster at Washington, D. C., dated March 1st, 1862, & gives notice of his intention to offer the said document in evidence for the purpose of showing the practice of the Government as to the payment of rent or compensation for enclosed lots in the city
318 of Washington. Also a paper purporting to be a letter from the office of the *office of the* Quartermaster Gen. to Mr. S. A. Peugh, dated 16 April, 1866, & gives notice of his intention to offer the same in evidence.

These two documents are marked for identification Auditor's Exhibits Nos. 1 & 2.

The complainant also files with the auditor & gives notice of his intention to offer the same in evidence, his affidavit.

The hearing is then adjourned until the 21 February, at 3 o'clock.

FEBRUARY 21, 1880 (1881?).

Hearing pursuant to adjournment.

Present: Mr. Peugh, the complainant, & Mr. H. S. Davis, for the defendant.

Mr. Peugh offers in evidence the papers filed by him at the last hearing in this cause, & the same are objected to by Mr. Davis, upon the ground that the documents marked Auditor's Exhibits Nos. 1 & 2 are incompetent, immaterial, & irrelevant. The affidavit of the complainant filed at the last hearing and now offered in evidence is objected to by Mr. Davis as being incompetent. The auditor excludes the said affidavit & notifies the complainant that if he desires to furnish his own testimony in this hearing it must be done according to the ordinary rules of evidence.

Adjourned till February 28, 2 o'clock.

Hearing pursuant to notice.

Present: Mr. H. E. Davis, for the defendant: Mr. Peugh, present in person.

CHARLES C. DUNCANSON, sworn:

319 By Mr. DAVIS:

Q. Mr. Duncanson, how old are you? Give your age and residence.

A. I am 35 years of age; resident, Washington.

Q. What is your occupation?

A. That of an auctioneer.

Q. How long have you been engaged in that business?

A. Myself?

Q. Yes, sir.

A. For the last eight years; previous to which I was with Wm. M. Wall, from 1862.

Q. Are you familiar with the value of real estate in this city from 1865?

A. I have knowledge of values of real estate from 1865 up to date.

Q. Have you any knowledge of the value of real estate in the northeastern section of the city during that period?

A. Yes, sir.

Q. Are you familiar with the squares numbered 910 & 911, situated between H & K streets and 8th & 9th streets, northeast?

A. I am.

Q. Between the years 1865 and 1878 what was the location of those squares with respect to the business centre of this city?

A. They never were considered as being near the business centre or probably ever would be.

Q. What was their location during that period with respect to the residence centre of the city?

A. In the year 1873 they began to improve in building a little on H street, more particularly than any other small buildings for parties considered of moderate means.

320 Q. Prior to that time, what was the availabilty of that section for either business or resident purposes?

A. Prior to the time of running the street railroad there it was virtually considered a portion of the country.

Q. Was there or not much, if any, demand for property of that description in that section of the city prior to the year 1872?

A. None, to my knowledge; but very little.

Q. Was there or not such demand about the latter part of 1872 and the earlier part of 1873; &, if so, state the character and extent of such demand, & the reasons giving rise to it?

A. The demand in the years mentioned was more of a speculative one.

Q. What was the occasion of that demand, if you know?

A. Well, there was, as we all remember, a speculation fever in regard to real estate in the year 1873, and I should judge from the fact that that fever caused people in other parts of the city to put their land up and probably brought it to the notice of the speculators.

Q. Are you familiar with the results of investments made in that section by reason of this speculative fever? If so, state those results.

A. The result, as a rule, with very few exceptions, where parties have invested in the purchase of property, they came out of the same in a crippled condition in the way of mortgages or loans; parties loaning money, with very few exceptions, have been forced to buy the property on which they loaned.

Q. From 1873 to the spring of 1878 what market, if any,

321 was there for unimproved property in that neighborhood?

A. About 1874 to about 1878; the market was very dull.

Q. What was the market value of the squares, in your opinion, from the year 1860 to the spring of 1878, inclusive?

A. The market value varied within the time specified. In 1865, or along about there, to about 1868 I suppose it ranged from three to four cents per foot. There is a difference in the value of the two squares, though the price which I have just stated is the average value of both as per square foot. In the year 1872 or 1873, or the first part of 1874, their value was a speculative one, and probably ranged from ten to fifteen cents. From 1874 up to 1878 they went a little back. Square 911, H street front, would probably have brought ten cents; the other portion of the same square would range from five to eight cents, according to location. Square 910, bounded by I & K, 8th & 9th, are not worth as much as square 911. I doubt whether it would have been possible to sell it as a square.

Q. How did the value of these squares, from 1868 to 1872, compare with their value from 1865 to 1868?

A. The difference in value would be very slight.

Q. Do you know how assessments of real estate in that vicinity compare with the market value from 1865 to the spring of 1878?

A. I am not thoroughly familiar with the assessed value of
322 these squares prior to 1873. As a general rule, in that neighborhood anything east of Delaware avenue was assessed in the neighborhood of what it would bring. Since 1873 the assessments, if anything, have been higher, especially in the assessment which was made in 1873, and allowed to remain until 1877.

Cross-examination by Mr. PEUGH:

Q. You say there was a speculative value. How does a speculative value differ from a real value? For example, a given price is offered for a piece of property, and that price may be large, but is not the price offered the actual value of the property so considered?

A. The difference between a speculative value and an actual value is from the fact that one man may think property worth more to him than the majority of other people would think it worth to them.

Q. Did you sell any property in the immediate vicinity of squares 910 & 911 between 1865 & 1870?

A. Yes, sir; with Wall & Company. There were certain squares sold to my knowledge. I speak now from recollection. If I had possession of the books of Wall & Co. I might refer more specifically to certain squares there, which were purchased by different parties. The square, I think about two squares east of square 911, bounded by H, 11th, & 12th & I street, if I remember correctly, was sold at a public sale for 3¾ or 3½ cents. A square or lots, five squares east, sold as low as 1¼ cents.

Q. At what time?

323 A. I think it was between 1868 and 1870 they were sold, sir.

Q. Did you sell any property immediately opposite or within a square of 910 or 911 after 1870 to 1878, and at what price?

A. I think we have, sir; I made a memorandum in regard to certain sales of property in that neighborhood which would possibly or may do away with a great many questions in regard to the matter. I brought my books with me for the purpose of refreshing my memory. I have my sales book with me, in which I have certain sales made in that section. We will go back to the year 1873. I would state that the reason for selecting that year is that it was the year in which I went into business for myself, and back to which I have dates of business; also the year in which real estate was at its highest. In August, 1873, I sold a lot on L street, between North Capitol & First streets west. I will state for the purpose of bringing it in that L, between North Capitol & First streets west, is worth more than the squares mentioned in this suit; it brought twenty cents per foot.

In January, 1874, I sold lots 28, 29, 30, & 33 in square 933, fronting I street, between 9th and 10th streets, improved by two two-story dwellings. They sold for *for* $475 to $510 each. Square 934, lots 12 & 13, Kelley subdivision, & lot 36 in the same subdivision; lots
12 & 13, improved by a two-story house & brick stable, sold for
324 $1,700; mansard roof, lot 36 in the same square, two-story frame, sold for $1,150.

The last half of square 855 was sold on the 2d July, 1877; if I had the plat-book I could give you —; the price of the lots ranged from $650 to $775. They were vacant lots.

I would state that in connection with that sale the prices paid by a party representing an insurance co. held a mortgage on it & they bid right up to what they thought would cover their claim: no one bid higher than their first bid, if I remember correctly.

On the 21st August, 1877, lot number 10, Lanckton's subdivision, square 933, improved by a two-story house, with modern conveniences, was sold for $1,300.

Q. Confine yourself to unimproved property.

By Mr. DAVIS:

Q. You speak of sales in square 933 in January, 1874, of lots improved by two two-story dwellings, at prices ranging from $475 to $510, what was the value of the improvements on those lots at that time?

A. It would have cost more to put the improvements there than the lots & improvements brought.

Q. You speak of sales of lots in square 934, improved, as bringing $1,700 & $1,150, what was the value of these improvements at the time of the sales of those lots?

A. (After examining his book.) The cottage-built houses, built by Mr. Kelley, on 9th & 10th streets, I suppose must have cost him in the neighborhood of $1,200 apiece to build them, if not more.

325 Q. You say, also, that on the 21st August, 1877, you sold lot ten in square 933, improved by a two-story house for $1,300?

A. Yes, sir; that house fronted on H street.

Q. What was the value of the two-story house on the lot at that time?

A. I doubt whether the same could be put there for the money it brought.

Q. You sold also on the 2 July, 1877, east half of square 855; how did that square compare in value at that time with squares Nos. 910 & 911?

A. Square 855 was worth considerably more than the I street front of square 911.

Q. How did it compare in value with the H street front of square 911?

A. I think the H street front is worth more than the lots mentioned here in square 855.

Q. Have you made between 1865 & 1878 sales of other property than you have already mentioned in the vicinity of squares 910 & 911?

A. I have made several, but not within the points as mentioned by Mr. Peugh. I may have made some, but do not recall them.

Q. Will you state what those sales were?

(Mr. Peugh objects; the objection is overruled, & Mr. Peugh excepts to the ruling of the auditor.)

A. On the 20th September, 1873, the sale mentioned as being on L street, between North Capitol & First street west, was re-
326 sold, at which resale it brought sixteen cents; this property is situated one square north of St. Aloysius church; on the 13th September, 1877, I sold lot ten, in square 819, for four cents. That was subject to a special improvement tax, and a notice made; no appearance of any work having been made, it was supposed there would be no bill. That is the only piece of unimproved property, except those mentioned in the cross-examination by Mr. Peugh, that I can at present call to my recollection within the time.

Recross by Mr. PEUGH:

Q. Have you been in the habit of building houses brick or frame?
A. I have had them built; I am not a builder personally.

CHAS. C. DUNCANSON.

OSCEOLA C. GREEN, sworn.

By Mr. DAVIS:

Q. What is your age?
A. I am a full grown man, 40 years old.
Q. Where do you reside?
A. District of Columbia.
Q. What is your occupation?
A. Real estate agent.
Q. How long have you been so occupied?
A. Since 1874.
Q. Are you familiar with the value of real estate in the N. E. section of the city from that date?
A. I think I am.
327 Q. Are you familiar with squares 910 & 911?
A. I know where they are and know the squares.
Q. From 1874 to 1878, what market, if any, has there been for property of the description of these squares?
A. There has been no demand for such property.
Q. What, in your opinion, was the market value of those squares from 1874 to the spring of 1878?
A. I believe if they were to be sold as an entirety they could not have been sold.
Q. Do you know how the assessed value of property in that immediate locality, from 1874 to 1878, compared with its market value?
A. My experience has been that the assessment was greater than the property would bring—unimproved property.
Q. What, in your opinion, was the average market value per square foot of squares numbered 910 & 911 from 1874 to 1878?
A. I would have to answer that question as I did the *the* other; I don't think it could be sold at a forced sale.
Q. You remember the panic in the fall of 1873?
A. That was before I went into the business. I remember the fact. I have lived here always.
Q. What was the effect of that panic upon the market value of

unimproved real estate in the vicinity of squares 910 and 911 from its occurrence until the spring of 1878?

A. Very much depreciated the value of all real estate.

Q. How did the depreciation of unimproved property con-
328 sequent upon the panic compare with the depreciation of improved real estate?

A. It was greater.

(Mr. Peugh objects to the question and answer.)

Q. How did that panic affect investments in unimproved real estate in that locality during the period indicated?

A. It was next to impossible to get loans on that property.

Q. How about sales?

A. I think I answered that before.

Q. Have you negotiated loans upon unimproved real estate in that locality which, as a consequence of those loans, was brought into the market for sale between the years 1874 & 1878?

A. On two pieces of property; yes, sir.

Q. What was the location of those two pieces of property with respect to which you say you negotiated these loans?

A. One at the corner of 11th & D streets N. E.

Q. Where was the other?

A. The other was between 5th & 6th & B & C, I think, sir.

Q. Northeast?

A. Northeast.

Q. What was the amount of those loans & the quantity of property covered by them?

A. The loan on the property, 11th & D streets, was $5,000 on about 35,000 feet of ground, one lot of which was improved.

Q. Now about the other.

A. The other was $8,000 on 38,000 feet of ground.

Q. Will you please state what was realized for such prop-
329 erty at such sales during that time, if such sales were made?

A. Less than the amount on them loaned.

By Mr. PEUGH:

Q. What experience have you had in regard to the sales of property in that immediate vicinity within one square of 910 & 911, since 1874?.

A. None, sir.

Adjourned till Monday, March 7, 1881.

MONDAY, *March* 7, 1881.

Hearing pursuant to notice. Present: Mr. Peugh in person, & Mr. Henry E. Davis for the defendant.

The question of the admissibility of the documents heretofore filed by the complainant, marked Auditor's Exhibit Nos. 1 & 2, being asked by the parties respectively, the auditor announces that the said documents as presented are not competent evidence touching the issues referred to him.

Thereupon Auditor's Exhibit No. 1 is withdrawn by the complainant, & to the ruling of the auditor, as to the Auditor's Exhibit No. 2, complainant notes an exception. At the request of Mr. Davis the hearing is adjourned until Wednesday, at 2 o'clock p. m.

WEDNESDAY, *March 9th*, 1881.

Hearing pursuant to notice. Present: Mr. Peugh in person, & Mr. Henry E. Davis for the defendant.

SAMUEL A. PEUGH sworn at this point by consent and in his own behalf, & deposes as follows:

In March, 1857, I borrowed from the defendant in this
330 cause the sum of $2,000 for sixty days, for which I paid him $150, delivering him a deed in fee, which, when paid, he returned the deed to me.

Mr. Davis objects to this line of testimony, as it is not relevant to the issues before the auditor, as the subject to which the offered evidence relates has been passed upon and decided by the Supreme Court of the United States, & this examination before the auditor is confined to the order of the supreme court of the District of Columbia as one of the results of that decision. The witness has already in this case testified to the same matter.

Mr. PEUGH continuing: In 1865 I was called upon by Mr. Winder, as a messenger from the defendant, to know why I claimed title in that property, squares 910 & 911, and for the first time did I know or suspect a controversy between the defendant & myself. He exhibited to me a bond which I had given Mr. Davis to secure him in the $2,000 loan.

Mr. Davis objects to the foregoing as wholly immaterial, and *irrevalent* to the issues before the auditor, & that it has been brought out by the witness in the cause heretofore.

Witness, continuing: I at once went to see the defendant at his office on 7th street, & we had a conversation as to the conflicting claims between he and myself, I insisting on ownership as being indebted to him, and he claiming absolute ownership, and offered him his money, his interest, taxes, costs, and one per cent. upon all his outlay, which he refused. The next day I went to see him, having procured the sum of $4,600, and waited on him at his office
again. He came into the hall. I then stated that I had
331 come *to* prepared to execute the offer that I made you yesterday, and that I am prepared to pay and tender you payment of all that is due you, and one per cent. of all that is due you, as Mr. Davis himself has testified.

Mr. Davis objects to this, as immaterial and *irrevalent* evidence bearing upon the issue in this cause which has already been under consideration of the court and has been determined: the order of the court precludes inquiry by the auditor into the subject of any alleged tender by the complainant. The auditor calls the attention of Mr. Peugh, the witness, to the decree, passed November 5, 1880, in

which the question of tender appears to be adjudicated, and is not among the issues referred to the auditor for inquiry, and requests the witness to confine his testimony to matters which are the subject of reference to the auditor as appears by said decree.

Mr. Peugh takes exception to the ruling of the auditor.

The WITNESS: I collected rent from 1866 from the Government for the use of property similarly situated to this.

Mr. Davis objects at this point to the above, as irrelevant and immaterial, for the reason that it is of no consequence at what point of time the Government began paying for the use and occupation of property by the military during the war, the defendant not being charg-able by the order of the court with any laches in respect of collecting the sums paid for the occupation of this property.

By Mr. DAVIS:

Q. Mr. Peugh, who is the owner of squares 910 & 911?

332 A. They were owned by Mr. Blanchard; he deeded the squares, subject to its encumbrances, to Mr. Peugh.

Mr. Peugh reserves the right hereafter to file with the auditor copies of records of the War Department and announces his case as closed.

RAWLEIGH W. DOWNMAN:

By Mr. DAVIS:

Q. Where do you reside?

A. In the District of Columbia.

Q. What is your occupation, & how long have you been so engaged?

A. In the real estate business, since 1865.

Q. Here in Washington?

A. Yes, sir.

Q. Are you familiar with the value of real estate in the northern section of the city; if so, for how long have you been?

A. Yes: I think I am pretty familiar with the value of real estate throughout the city in that section, and in the northeast section, too.

Q. Do you know the location of squares 910 & 911?

A. I do.

Q. From 1865 to 1872 what demand, if any, was there for property of the description of these squares in that locality?

A. Well, there was not much demand. In 1872 or 1873 there was more or less demand for real estate all over the city; there was a sort of boom in real estate during that time, but more especially in the northwest part of the city.

Q. From 1873 or 1874 down to the spring of 1878 what demand, if any, was there for such property as in that neighborhood?

333 *Q. From 1873 or 1874, down to the spring of 1878, what demand, if any, was there for such property as in that neighborhood?*

A. There was not much demand, with exception of certain localities; out there where Mr. Kelley was engaged in business (building?), for instance, that created a demand in that neighborhood.

Q. When was Mr. Kelley engaged in building?

A. He was engaged in building about that time, I think. I really don't know as I could fix the date exactly. I think he commenced building in 1873 or 1874.

Q. What effect, if any, did the panic of the fall of 1873 have upon demand for property of this description in that locality?

A. In the panic of 1873, the price & demand of property all over the city began to decline, and it affected first what is termed outside property, that is, property remote from the centre of the city: that was the earliest & most seriously affected.

Q. How does this property stand as to the caterory of outside property?

A. Well, it was pretty far out; it would be considered as outside property.

Q. Do you know how the assessed value of property of that description and in that neighborhood, as compared with the market value from the periods from 1865 to 1872, & from 1874 to 1878, respectively?

Mr. Peugh objects to the question as having no relevancy to the question before the auditor.

A. Well, I think that the assessed value of property all through that section of the city covering the period, the two periods,
334 mentioned was fully up to the market value of it, and in a great many instances beyond it; that is, the property would not bring what it was assessed at. I might mention that I had in my hands, for sale, a large amount of property there on the south side of H street belonging to Louis McKinzie, of Alexandria, during that time, and I made a good many efforts to sell it, both at public & private sale, and could not get the price that he wished for it; it was pretty low, too,—ten cents a foot.

Q. During what period did you attempt to make this sale?

A. I think that he gave me the property to sell in 1871, and I had it for several years. I had for three or four years tried to sell it, advertised it, and made an attempt to sell it at auction, but did not succeed.

Q. What, in your opinion, was the market value of squares 910 & 911 for the period from 1865 to 1869, say, inclusive?

A. Well, I think that about 1872, when property was at the highest, that the square fronting on H street could be sold for ten cents a foot. I think I was authorized once to see Mr. Davis in reference to the purchase of that square, and was authorized to offer about that sum for it, and he said it was not for sale, and the matter dropped through. The square immediately in the rear would not be worth quite so much.

Q. Was the market value of those squares greater or less from 1865 to 1872 than in 1872; and, if either, what was the advance?

A. Well, the property sold for more in 1872, because there
335 was quite a rise in property after 1868.

Q. What, in your opinion, was the market value of those squares from 1874 to the spring of 1878, reference being had to the demand for property of that description in that locality during that time?

A. I don't think at any time during that period that square 911 would have brought more than ten cents a foot, if that, and the square north of it a less value, being more remote from the street railroad.

Q. Do you know of any sales of property of that description in that locality during that *locality during that* period?

A. There was a square sold, 837 (832?), I believe that is the number; it is not over two squares from it; it is just down at the foot of the hill from the asylum. That square was sold about that time I don't recollect exactly the amount per foot, but I could tell you where you could get the information exactly. This square was sold for about $12,000. I do not remember the size.

(Mr. Peugh objects to the answer, because it is not within the purview of the inquiry as to locality.)

Q. You have spoken of an increased demand in 1872 or 1873 for property throughout the city; what was the occasion and character of that demand?

A. About that time the improvements that were being carried on by the Board of Public Works here were in full operation, and the idea prevailed that property would be very much improved by the numerous street improvements that were being carried on, & it created a demand for unimproved property, because persons
336 thought they could buy, and after the streets were improved it would pay them a handsome profit. It was a speculative value at that time.

Q. Did that speculative value continue?

A. No, sir; nearly every one who went into these speculations at that time lost money by it. There was some cases where persons bought at that time real estate and very quickly afterwards made money, but those who took it from them lost. Any person who held property after 1874 lost.

Q. Do you know how the assessments made on real estate throughout this city, from 1873 to 1874, compared with the real market value of the property? and, if so, state it.

(Mr. Peugh objects to the question, as having no relevancy to the subject.)

A. The assessment made at that time was considered to be a very high one for unimproved property; it was fully up to the worth of it; there might be some exceptions to it. Sometimes individuals could get their property assessed at a low price.

Q. How does square 837 compare in value with squares 910 and 911?

A. Being west of square 911, it is of greater value. Property brought a better price as you come westward down H street.

Cross-examination by Mr. PEUGH:

Q. Mr. Downman, you have stated that you are familiar with this property and the surroundings of squares 910 & 911; are there any improvements, in the shape of buildings, opposite them
337 or on the squares immediately adjoining?

A. There are improvements east and west and south of these squares.

Q. What sized houses are there on the south side of square 911; what character of houses?

A. On the south side of H street there are a very good class of houses; some brick houses and some frame; stores and dwellings.

Q. What storied houses?

A. I think that there are some three-story houses, and some two-[story] houses probably.

Q. Is Ninth street built up on the east side from K to E, or Maryland avenue, running from K St. to Maryland ave. or E street?

A. I could not say positively; it is not built up all along there.

Q. Is 8th street built upon from I to G, on the west side, or is it not?

A. When you come down to it particularly, I know that on both sides my recollection is that these squares now seem to occupy a vacant space, and either side, east & west, is pretty generally built up with small houses; on the east side there are frame houses, two stories.

Q. You have stated that squares 910 & 911 are vacant; are not they the only (vacant) squares in that *in that* vicinity?

A. They are the only entire vacant ones, unless you go north of it; there are some vacant ones there.

Q. You know the effect of the street railroad running south of square 911, of course?

A. Certainly.

338 Q. Do you know why these squares were not built upon?

(Objected to by Mr. Davis.)

Q. Do you know why they were not built on?

A. I know, like any one else familiar with the history of these squares for some time past, that there was a contest about them, and I presume that was one reason why they were not sold.

Q. You have stated that you tried to purchase these squares; did you know what use the purchaser proposed to make of them?

(Mr. Davis objects to this, as misstating the evidence of the witness, as he had testified only to the attempt of purchasing square 911; and that the latter part of the question is irrelevant & immaterial.)

Q. You have stated that Mr. Kelley did build in that neighborhood?

A. Yes, sir; quite largely south of H street.

Q. Was there or was there not much improvement in that immediate vicinity about that time—the year 1872?

A. There was an improvement in that neighborhood after the railroad was built.

Q. Was the improvement considerable or inconsiderable?

A. Quite considerable; the whole length of the street.

Q. You have stated that you sold square 837 for $12,000.

A. I did not say that; I said I knew of the sale of square 837 for $12,000.

Q. Do you know the locality of that square?

A. I will tell you the square I had reference to was one that belonged to Selmar Seibert; that was the square I had reference to.

Q. Do you know between what streets?

339 A. Between 5th or 6th or 7th; I am not positive about that; I know it is just before you get to these squares; I have really forgotten; I could go right to it.

Q. Square 890 and square 889 is immediately west of square 910 & square 858 is immediately — of 889; square 837 don't come in until you get to 4th street, I am sure.

A. Maybe it is between 4th & 5th.

Q. Now between what lettered streets do you remember the square you refer to as the property of Selmar Siebert?

A. It fronted on H street—between H & I—on the north side; well, it was between 4th & 5th, because, I now come to think of it, it was one square east of where there was a burying ground, which is now graded off.

Q. Did you sell any property in that neighborhood from 1865 to the 15th April, 1878?

A. None, except the square I have mentioned.

Q. I understood you to say that you knew the fact.

A. I had a connection with it; it was not sold directly by me, although I was connected with the sale.

By Mr. DAVIS:

Q. You have been interrogated with respect to Mr. Kelley's buildings in that section; do you know how Mr. Kelley's investments in those buildings resulted?

A. I think it was disastrous, as it is pretty well known.

Q. Who authorized you to approach the defendant for the purpose of attempting to purchase 911?

A. Mr. James C. Kennedy, now dead.

Q. Who bought square 837?

340 A. He was the same man. I am not positive about the price that he gave for it; since I come to think about it, I think the price was what Mr. Kennedy sold it for. He bought it for a pretty low figure. He afterwards sold it to Arstrop & Dudley, who were engaged in real estate business about that time.

By Mr. PEUGH:

Q. Is not the real value of property the price at which it sells for, in your judgment?

A. Well, sir, that question came up yesterday. I was engaged with Mr. Samuel Cross in assessing some property *in* down in East Washington. I don't think it is always the value of it. I know an old gentleman by the name of Bancroft, who bought a large quantity of land at ten cents a foot, and at the time that he bought it it was not worth half what he gave for it. It was worth ten cents to Mr. Clark, because he sold it for that. It was not the market value by any means.

Q. Is not the price of the vendor the value of it to the vendor?

A. That is what I answered. Of course that is the value of it to the vendor.

RALEIGH W. DOWNMAN.

Adjourned until to-morrow, 10 o'clock.

THURSDAY, *March* 10, 1881.

Hearing pursuant to notice.

Mr. Peugh present in person; Mr. H. E. Davis for the defendant.

ROBERT O. HOLTZMAN sworn:

By Mr. DAVIS:

Q. Where do you reside, Mr. Holtzman?

A. No. 720 Tenth street N. W.

341 Q. What is your occupation, & how long have you been so engaged?

A. Engaged in the real estate business about seven years.

Q. Are you familiar with the value of real estate throughout the city during that period, and also with the value of real estate in the northeastern section of the city?

A. Yes, sir.

Q. You know the location of squares 910 & 911?

A. Yes, sir.

Q. What demand, if any, was there for property of the description of these squares in that locality from 1873 or 1874 to the spring of 1878?

A. Very little, if any.

Q. What opportunities, if any, were there for the sale of or successful development of such property during that period?

A. Well, from 1875 or 1876 there has been none that I know of.

Q. You remember the financial panic of the fall of 1873?

A. Yes, sir.

Q. What was the effect of that panic upon the demand & for the possibilities of utilization of such property?

A. Depressing.

Q. What, in your opinion, was the market value of those squares from 1874; say to the spring of 1878?

342 A. Well, in 1874 & 1875, I think that property was worth about fifteen cents a foot. It was so thought among the fraternity, but since that time it has gradually decreased in value.

Q. When you say that the property was worth fifteen cents a foot,

am I to understand that, sold as a whole, the property would, in your opinion, at that time have realized that price?

A. Well, I am not certain that it could have realized as much. It might under certain circumstances.

Q. How does square 910 compare in value with 911; 910 is the northern one?

A. I don't see much difference in them.

Q. At what price, in your opinion, could those two squares, as a whole, have been sold between 1875 and the spring of 1878, if at all?

A. Well, it would have been very difficult to have gotten over ten cents a foot for it, if that. I mean square foot, of course.

By Mr. PEUGH:

Q. You have been in the business from July, 1874?

A. Yes, sir.

By Mr. DAVIS:

Q. Do you know of any sale of property of this description and extent in that locality *and extent in that locality* during the term mentioned?

A. But one.

Q. What was that?

A. That was a sale to Mr. Ketchum, and I heard of it only. I don't know as that would be evidence.

Q. What was the general condition of the real estate market in this city for a period of five years subsequent to the panic of the fall of 1873?

343 A. Depressed in speculation.

Q. Was there or not any disposition to invest in real estate for the purpose of development during that period?

A. None that I know of, except for home residences.

Q. I understood you to say that there was no demand, if any, for property of such as this, from 1875 to the spring of 1878?

A. Not that I know of.

Q. And you say that these squares in your opinion, during that time, would not have brought more than ten cents a foot, if so much?

A. I do; I mean to say by that that ten cents a foot would be the minimum figure.

Cross-examined by Mr. PEUGH:

Q. Mr. Holtzman, how many real estate brokers are there in this city?

A. Mr. Peugh, that is a pretty hard question to answer.

Q. Twenty-five?

A. Oh, yes, sir; a hundred; what I mean is, they call themselves real estate brokers.

Q. How many are engaged in the regular ostensible business transactions who maintain business for that purpose?

A. About eight or ten.

Q. Does your knowledge of the business of real estate brokers extend to all these real estate brokers?

(Mr. Davis objects to the question as not responsive to the direct examination, and it is not cross-examination.)

344 A. I don't know any other broker's business saving my own.

Q. Do improvements, building, &c., add value to real estate?

A. If they are of a good character of buildings.

Q. You have said you were familiar with the locations of these squares.

A. Yes, sir.

Q. Are you familiar with their surroundings?

A. I don't know that I am at this particular time.

Q. Do you, or not, know of the existence of a row of three-story houses on the south side of H street, opposite square 911, during the period you have mentioned; that is to say, between 1874 and 1878?

A. I know there are a row of houses there.

Q. What class of houses are they?

A. Three-story bricks.

Q. All the way between 8th and 9th streets?

A. I think so, sir.

Q. Is there any buildings on the east side of square 911, and what kind of a house (of buildings)?

A. Not to my knowledge.

Q. Is there on the west side of square 911, immediately opposite?

A. I think not; I am not positive.

Q. Is there any improvements on 9th street from H, southward, towards E, or Maryland Ave., where they come together?

A. I think there is, on the east side of the street; I think there are some two-story bricks.

Q. Then you understand these to be a row of two-story bricks extending from H to I street on the east side of 9th street, op-

345 posite this square?

A. Directly opposite this square there are a lot of little two-story bricks, occupied by colored people generally.

Q. Do you know if there are any between I & K on the east side of 9th street?

A. I think there is; maybe one or two in there; I don't recollect.

Q. Then you don't recollect in regard to the houses built in that vicinity except as you have stated?

A. Exactly.

Q. How with regard to 8th street opposite square 911; have you any knowledge?

A. Yes, sir; I think there are some fraime houses over there—small ones.

Q. Between H & I?

A. Yes, sir; I think there are.

Q. With regard to H street south of H; is *is* not the east side of 8th street from H to G built up?

A. Yes, sir; I think there are frame houses in there; I am not sure of that. I don't know whether Mr. Kelley built those two-story houses or not. I know there are on 9th, but on H I am not positive.

Q. What do you regard as the value of property; what it will sell for?

A. What it will bring.

Q. May not property bring a price very different from your estimate of its value?

A. Somebody might see it in a different light.

Adjourned to Tuesday next, at 2 o'clock.

ROBT O. HOLTZMAN.

TUESDAY, *March 15th*, 1881.

346 Hearing pursuant to notice.

Present: Mr. Peugh, in his own behalf, and Mr. H. E. Davis, for the def'nd't.

Mr. PEUGH recalled by Mr. DAVIS.

By Mr. DAVIS:

Q. The taxes on this property in dispute were paid, I believe, by the defendant up to and including the first half of the year 1878; have or have not the taxes on the property been paid since that time; and, if so, by whom?

(Mr. Peugh objects to the question, for want of relevancy to the subject.)

The auditor declines to require the complainant to answer this question, for the reason it is not relevant to any of the issues referred to the auditor for inquiry and report; and, if admitted, would necessitate the entry upon a very large field of testimony upon both sides which would be equally immaterial and irrelevant to the issues named.

Q. Were not squares 910 & 911 sold by the District government for default in payment of the taxes thereon for the year ending June 30, 1880?

A. I decline to answer the question for the same reason.

The auditor declines to require him, and Mr. Davis takes exceptions to both rulings.

Mr. Davis announces the testimony on his side closed.

Adjourned subject to notice.

MONDAY, *March 21st*, 1881.

Hearing pursuant to notice.

Present: Mr. Peugh, in person; Mr. Davis, for the defendant.

Mr. LORING CHAPPELL sworn.

347 By Mr. PEUGH:

Q. Mr. Chappell, please state where you reside in the city of Washington.

A. Near the corner of 7th & I streets N. E.

Q. How long have you resided in Washington?

A. Since 1872.

Q. Have you resided all that time in that neighborhood, from 1872 up to the present time?

A. With the exception of about eight months that I boarded down town before I went housekeeping; my work was out there all the time, though.

Q. Do you know the localities of squares 911 & 832, the one on H street N. E., between H & I & 8th & 9th, and the other on H street, between H & I & 5th & 6th?

A. Yes, sir: I am well acquainted with their locality.

Q. Have you purchased and been interested in the purchase and sale of real estate in the vicinity of square 911, and between what periods of time?

A. Yes, sir; I have been interested in the purchase and improvements of lands in that immediate vicinity, and indeed in the whole square immediately opposite.

Q. Were you largely engaged in the purchase & improvement?

A. Yes, sir: largely.

Q. To what extent?

A. With my partners, to the amount of some $100,000, I think, sir, in that immediate vicinity, and the greater portion of it was right across the square that he speaks of.

Q. As a purchaser of real estate in that immediate vicinity would you make a difference in the value between squares 832 & 911?

348 A. Yes, sir; I should make a difference.

Q. What difference would you make, & why would you make that difference?

A. I consider square 911 is worth a quarter more. I would not wish to give more than three-quarters as much for 832 as for 911.

Q. Then, is the auditor to understand you, Mr. Chappell, as meaning to say that square 832 is worth a third less than 911, or a fourth less than 911?

Question objected to.

Q. Mr. Chappell, what would be your meaning or estimate of the comparative value of 832 with 911, if you had been desirous of purchasing them, or how much more would you have been willing to give for 911 than you would have been willing to give for 832; if any more, fixing the amount in dollars & cents, per square foot?

A. I think it is worth 6¼ cents per square foot more than the other.

Q. You are aware, Mr. Chappell, that square 832 lies nearer the centre of the city than square 911; why would you make the differ-

ence in favor of 911, stating substantially in detail all the reasons that occur to your mind?

A. I make the difference, sir, on account of the location; and the reasons I can give; square 911 is the absolute central portion of the population and improvements of that part of the city; square 832 is not. Square 911 is surrounded with valuable improvements on three sides on the opposite side of the streets, and the square is also surrounded with street improvements complete. Sidewalks & streets
349 complete, with trees put on &c., &c., and I consider that 9th and H is the real centre of the population there and of the improvements, and I consider that a very desirable square. 832 is farther this way. It is nearer the main portion of the city to be sure, but it is nearer a portion of the city that it is not very desirable—what is known as Swampoodle. It is not surrounded with improvements as square 911; neither on the opposite sides of the street anything to compare with the other; neither is the streets themselves improved. Only H street is improved, as is on the other front. One of the streets—but where the street should come, 6th street, is not opened up at all. It has not been improved. There has been nothing done to it. I street is crowded out of the street to a certain extent by the railroad, and there is no improvements there, with the exception of a sidewalk, and then it is in the immediate vicinity of the Baltimore & Ohio railroad, which certainly deteriorates, in my opinion, very much the value of the square, for the reason that it interferes with at least one-half of it. The Baltimore & Ohio road has a great embankment along there on the north front of this square, and I think it runs into the street there, and it brings it up very close and contiguous to the square, and makes it an undesirable place for improvements for buildings. That road interferes very much with the square 832. It does not at all with the other, 911, except as interferes with all that section.

(Question & answer objected to, as irrelevant and immaterial, for the reason that the present ratio of value in respect to those
350 squares cannot have any bearing upon the issues now before the auditor in this cause.)

Q. You speak, Mr. Chappell, of a high embankment of the Baltimore & Ohio railroad along I street opposite square 832; about what height is that embankment?

(Question objected to.)

Cross-examined by Mr. DAVIS:

Q. What is your occupation, Mr. Chappell?

A. Anything at present, sir. Since I have been in this city my main occupation has been real estate business.

Q. How long since you discontinued that occupation?

A. It is not discontinued in full as yet. As agent, I have charge of some buildings now, but I am not doing anything with them at present.

Q. You spoke of your partners and a company who were your partners, and what was the company?

A. Partners were A. B. Kelley & F. C. Cate.

Q. What was the company?

A. Cate, Kelly & Chappell.

Q. In what was the company engaged while you were a member of it, and from what period of time?

A. First engaged in after I joined the company, the first thing was to buy the square immediately opposite the one spoken of here, 912.

Q. What was the object of the company?

A. To purchase lands and improve.

Q. Through how long a period was this company engaged?

A. For about two years before Mr. Cate sold his interest to
351 Mr. Kelley in some way or shape. I don't know exactly how. In the last operations only Mr. Kelley & I were in.

Q. When did these operations commence & when did they terminate?

A. Commenced in about June, 1872, and terminated in 1877.

Q. Have you had any experience as a real estate purchaser or dealer before you came to Washington?

A. Yes, sir.

Q. Where & for how long?

A. In Clinton county, in the State of New York.

Q. How long?

A. I will say directly from 1853 up to 1872, and had some operations there after I came here, some lands that we owned.

Q. Now, sir, what property did yourself, Mr. Kelley, & Mr. Cate purchase or develop in this city between the years 1872 and 1876?

A. We purchased all of square 912, all of square 889, all of square 934, and part of square 960.

Q. Were these squares paid for by yourself, Mr. Kelly, & Mr. Cate?

(Mr. Peugh objects to the question, and the auditor allows the question.)

A. I can answer as far as I am concerned myself; I paid for everything.

Q. How about Mr. Cate & Mr. Kelley?

A. I can't answer that question, sir.

Q. Can you answer whether the vendors of those squares received the purchase price agreed upon between themselves, on the
352 one hand, and yourself, Mr. Kelley, & Mr. Cate, on the other?

(Mr. Peugh objects to the question, & the auditor sustains the objection, & Mr. Davis takes an exception.)

Q. How did your company come out of the investments in this property?

A. I can speak only for myself, sir.

Q. Speak for yourself.

A. Our interests in these squares were divided up; 912 was all paid for. I know I paid my portion; I am pretty sure it was all paid for. Square 934 I paid $2,100 towards it, & then sold my interest and got my money back. Square 889, which we purchased

we paid down a certain amount, $6,000. It is right aside of this square 911, on the west side of it; we paid down $6,000, and there was a ——— with the owners that held the deeds of trust for the balance of the pay, by paying so much on the lots. Our company divided up these lots between us; I paid for all mine & got a release; those that I had anything to do with were paid for.

Q. Were not your investments unremunerative?

A. They were unremunerative, and for this reason, that we purchased and built when material, labor, and everything was at the very highest in 1872, and the early part of 1873, and we had to sell after the panic came on, and prices and values depreciated one hundred per cent., perhaps more than that.

Q. Among your reasons for fixing the value of square 911 as greater than that of 832, you mention the fact that you
353 regard it as in the central portion of improvements in the northeastern section of the city. Was that true prior to the year 1873 or 1874?

A. Yes, sir; the finest block of houses that there is in the northwestern portion of the city is right on the corner of H and 9th.

Q. When was it built?

A. In the summer of 1873; a portion of it, however, was built in 1872; and in 1873 the house I live in myself.

Q. As a matter of fact, Mr. Chappell, was there not a great deal of speculation for the purposes of building going on in that section in the years 1872 & 1873?

A. I don't know that there was, sir, any further than our own operations.

Q. I understand you came to Washington in 1872, and you therefore know nothing of the condition of the northeastern section of the city prior to that time.

A. I had been here on a visit and knew something about it the winter before.

Q. Do you know when the streets in that section began first to be opened up?

A. I know that that began before I came there, because they were at it when I came; I was superintendent of streets for several years; they were cutting out and grading G street when I came.

Redirect by Mr. PEUGH:

Q. Do you remember what you paid for square 889, Mr. Chappell?

354 (Question objected to, and the objection is sustained.)

Q. You have stated in your testimony upon cross-examination, that they were grading G street when you came here?

A. Yes, sir.

Q. Was or was not H street graded when you came here?

A. It was graded pretty much as it is now, with the exception of a cut. They cut the hill down along in the vicinity of second street.

LORING CHAPPELL.

Adjourned till Wednesday, Mar. 23, at 3 o'clock.

From the records in my office I certify that no further depositions were taken in the reference to me; the subsequent hearings being for the submission of documentary proof and for argument.

JAMES G. PAYNE, *Auditor.*

Filed June, 1882.

355 In the Supreme Court of the District of Columbia.

SAMUEL A. PEUGH *ag'st* HENRY S. DAVIS. } No. 1713. Eq.

This cause coming on for final hearing on the reference thereof to the auditor for the statement of an account between the parties hereto, on the report of the said auditor, James G. Payne, stating the said account, and on exceptions as well of the complainant as of the defendant to the said report, and being by the court considered, it is this 6th day of October, 1881, adjudged, ordered, and decreed that all the exceptions, save and save only the second exception of the defendant respecting the market value of the premises herein involved, be, and the same hereby are, overruled, with costs, and that the said second exception of the defendant be, and the same hereby is, sustained, the said market value being hereby fixed at the assessment valuation by the government of the District of Columbia for the several years during the period involved in the reference herein.

It is further adjudged, ordered, and decreed that on the 15 day of April, 1878, there was due to the defendant from the complainant herein, on account of the mortgage in the bill of complaint alleged, the sum of three thousand two hundred and twelve dollars

356 and sixty-eight cents ($3,212.68), which said sum is unpaid and still due, and payable from the complainant to the defendant on the account aforesaid, with interest from the said 15th day of April, 1878, and one hundred and forty dollars ($140), the costs of the said auditor for the statement of the said account. And it is further adjudged, ordered, and decreed that unless the complainant shall, on or before the first day of February next, pay, or bring into this court to be paid, unto the defendant the said sum of three thousand two hundred and twelve dollars and sixty-eight cents ($3,212.68), with interest from the said 15th day of April, 1878, until the day of payment or bringing in as aforesaid, together with the said sum of one hundred & forty dollars ($140), costs as aforesaid, the said mortgaged premises (being squares No. 910 and 911 in Washington city, D. C.), or so much thereof as may be necessary to realize a sufficient sum, not to exceed five thousand dollars ($5,000), to satisfy this decree and all proper costs to be sold: and that Henry E. Davis and J. J. Johnson be, and they hereby are, appointed trustees to much such sale, and the course and manner of their proceedings shall be as follows: They shall first file in the clerk's office of this court a bond to the United States, executed by themselves, and a surety or sureties to be approved by the court, in the penalty of ten thousand dollars ($10,000), conditioned for the faithful perform-

ance of the trust reposed in them by this decree, or which
357 may be reposed in them by any future order or decree in the premises.

The- shall then proceed to make sale of the said mortgaged premises, or so much thereof as may be necessary in accordance with this decree, the said trustees being hereby authorized to make the said sale by such subdivisions of the said premises as in their judgment may seem meet, just, and necessary in accordance herewith, having first given public notice thereof by advertisement in some newspaper in the said Washington city for ten days prior to the day of sale, and such other notice as they may think proper, of the time, place, manner, and terms of sale, which said terms shall be cash at the time of sale.

And as soon as may be convenient after the said sale the said trustees shall return to this court a full and particular account of the same, with an affidavit of the truth thereof annexed; and on the ratification of the said sale by this court, and on payment of the purchase money, the said trustees, by a good and sufficient deed, to be executed and acknowledged agreeably to law, shall convey to the purchaser or purchasers of the said property and to his, her, or their heirs, the property to him, her, or them sold, free, clear, and discharged of all claim of the complainant herein, and of any person or persons claiming by, from, or under him. And the said trustees shall bring into this court the money arising
358 on such sale, to be disposed of under the direction of the court, after deducting therefrom all proper costs and such commissions to the said trustees as the court shall think proper to allow in the premises.

By the court: A. WYLIE.

Filed October, 1881.

Appeal to general term allowed and bond approved.

In the Supreme Court of the District of Columbia, the 22d day of October, 1881.

SAM'L A. PEUGH, Plaintiff, }
v. } No. 1713.
HENRY S. DAVIS, Defendant. }

The plaintiff having appealed to the general term from the decree pronounced herein on the 6th of October, 1881, in the equity court, and complainant, Caroline S. Peugh, & A. T. C. Dodge, sureties for said appeal, for themselves and each of them, their and each of their heirs and personal representatives, appearing and submitting to the jurisdiction of the said general term, hereby undertake to abide by, perform, and pay its judgment, which they agree may be pronounced against all of them.

SAM'L A. PEUGH, *Appellant.*
CAROLINE S. PEUGH, }
A. T. C. DODGE, } *Surety.*

Signed in the presence of—
WM. HELMICK.

DISTRICT OF COLUMBIA, *ss:*

On this 22 day of October, 1881, personally appeared Caroline S. Peugh, surety on the within undertaking, &, being duly sworn, says that she is worth ten thousand dollars of real estate in her own right in the District of Columbia above all her liabilities.

CAROLINE S. PEUGH.

Subscribed & sworn to before me, this 22 day of October, 1881.

WM. HELMICK, [SEAL.]
Justice of the Peace.

Also personally appeared A. T. C. Dodge, who, being duly sworn, says that he believes himself worth five thousand dollars in personal property over & above his just debts.

A. T. C. DODGE.

Subscribed & sworn to before me, this 25 day of October, 1881.

WM. HELMICK, *J. P.* [SEAL.]

[Endorsed:] No. 1713. Peugh *vs.* Davis. Undertaking for appeal by complainant to gen'l term. Approved Oct. 26, 1881. D. K. Cartter, ch. justice. Filed Oct. 26, 1881. R. J. Meigs.

359 SAMUEL A. PEUGH, Complainant,
vs.
HENRY DAVIS, Defendant. } In Equity. No. 1713.

This cause coming on for the consideration of the court upon the opinion and decree of the Supreme Court of the United States herein, of the 15th day of April, 1878, upon the order of this court, in special term, of the 23d day of November, 1878, referring the cause to Thomas Hood, Esq., auditor, for the statement of an account between the parties hereto, in accordance with the said opinion and decree of the Supreme Court of the United States; upon the report and statement of the said account by the said Thomas Hood, auditor, upon the order of this court, in special term, of the 5th day of November, 1880, on the said report and statement of account by the said Thomas Hood, auditor, setting aside the said report, and referring the cause to James G. Payne, Esq., auditor, for the statement of an account between the said parties, as in the said order directed; upon the report and statement of the said account by the said James G. Payne, auditor, and the order and decree of this court, in special term, of the 6th day of October, 1881, modifying the same, and upon the
360 respective exceptions and appeals of the said parties in the premises, and, being argued by counsel, and by the court considered, it is, this 30th day of October, 1882, adjudged and decreed that the said orders and decrees of the special term of this court of the 5th day of November, 1880, and the 6th day of October, 1881, aforesaid, be, and the same are hereby, reversed and held for naught, and that the said reports and statements of accounts herein by the said Thomas Hood and James G. Payne be, and the same hereby are, set aside.

And it is hereby further adjudged, ordered, and decreed that on the 23 day of October, 1882, there was due to the defendant, Henry S. Davis, from the complainant, Samuel A. Peugh, on account of the certain mortgage of squares numbered nine hundred and ten (910) and nine hundred and eleven (911), in the city of Washington, and District of Columbia, in the bill of complaint set out and alleged, the full sum of eleven thousand five hundred and seventy-one dollars and ninety-five cents (11,571.95), which said sum is still unpaid, due, and payable by the complainant to the defendant on the account aforesaid, with interest, and the costs of this cause, since the 23d day of November, 1878, aforesaid, subject, however, to the following credits due the said complainant, viz: On the 23 November, 1878, the sum of four hundred and thirty dollars & fifty cents
361 ($430.50), being the costs of the cause up to that date; on the 11 day of May, 1875, the sum [of] eighteen dollars and seventy-five cents ($18.75), and on the 23 day of August, 1876, the sum of nine hundred and thirty-one dollars and thirty-seven cents ($931.37).

And it is further adjudged, ordered, and decreed that unless the complainant shall on or before the first Monday of January next pay, or cause to be paid, unto the defendant the sum of eleven thousand five hundred and seventy-one dollars and ninety-five cents ($11,571.95), with interest and costs as aforesaid, the said mortgaged premises, viz: the said squares numbered nine hundred and ten (910) and nine hundred and eleven (911), be sold; and that Henry E. Davis be, and he hereby is, appointed trustee to make such sale, and the manner and course of his proceeding shall be as follows: He shall first file in the clerk's office of this court a bond to the United States, executed by himself and a surety or sureties to be approved by the court, in the penalty of twenty thousand dollars ($20,000), conditioned for the faithful performance of the trust reposed in him by this decree, or which may be reposed in him by any further order or decree *or decree* in the premises. He shall then proceed to make sale of the said mortgaged premises, either
362 as an entirety, or by squares or by lots, according to the recorded subdivisions thereof, as in his judgment advisable, having first given ten days' (10) public notice, by advertisement in some newspaper published in the said city of Washington, of the time, place, manner, and terms of sale, which said terms shall be cash at the time of sale. And the said trustee shall duly report to the court his action in the premises; and on the ratification of the said sale by the court and the payment of the purchase money he shall, by good and sufficient deed or deeds, convey to the purchaser or purchasers at the said sale, and to his, her, or their heirs, the property by him, her, or them bought, free, clear, and discharged of all claim of the complainant herein, and of any person or persons claiming by, from, or under him; and the said trustee shall bring into this court the money arising from the said sale, to be disposed of under the direction of the court, after deducting therefrom all proper costs, charges, and commissions. And from this decree the

complainant, Samuel A. Peugh, prays an appeal to the Supreme Court of the United States, which is allowed.

By order of the court:

D. K. CARTTER,
Ch'f Just.

Filed Oct. 30, 1882.

* * * * * * * *

418 DISTRICT OF COLUMBIA, *to wit:*

To Henry S. Davis:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next, pursuant to an appeal entered in the clerk's office of the supreme court of the District of Columbia, wherein Samuel A. Peugh is plaintiff and you are defendant, to show cause, if any there be, why the decree in the said cause should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

D. K. CARTTER,
Ch'f Just.

Summoned in person January 13, 1883.

CLAYTON McMICHAEL,
U. S. Marshal.

419 In the Supreme Court of the District of Columbia, the 3d day of January, 1883.

SAMUEL A. PEUGH, Complainant.
vs.
HENRY S. DAVIS, Defendant. } In Equity. No. 1713. Docket 9.

Know all men by these presents, that we, Henry E. Davis and Henry S. Davis, all of the District of Columbia, acknowledge ourselves indebted to the United States in the penal sum of twenty thousand dollars, for the payment of which we bind ourselves & every of our heirs, executors, and administrators, jointly & severally for & in the whole.

Whereas the said Henry S. Davis has been duly appointed trustee under & by virtue of the order & decree of the supreme court of the District of Columbia, sitting in general term, the said order & decree having been on the 30th day of October, 1882, rendered in the above-entitled cause: Now, the condition of the above obligation is such that if the above bounden Henry E. Davis shall well & faithfully discharge his duties as said trustee in accordance with law, the rules of the said court, & its said decree of the 30th day of October, 1882, aforesaid, & shall in all things obey such order and

decree as this court shall make in the premises, then the above obligation to be void & of no effect; else to be in full force & virtue.

HENRY E. DAVIS. [SEAL.]
HENRY S. DAVIS. [SEAL.]

Witness:
JOSEPH H. HILTON.

Approved by order of the court this 3d day of January, 1883.
D. K. CARTTER, *Ch. Just.*

[Endorsed:] Eq. 1713. Docket 9. Samuel A. Peugh, pl'ff, *ag'st* Henry S. Davis, def't. Bond of Henry E. Davis, trustee, under decree of 30th Oct., 1882. Filed Jan. 3, 1883. R. J. Meigs, clerk.

420 In the Supreme Court of the District of Columbia, holding a General Term.

SAMUEL A. PEUGH
v.
HENRY S. DAVIS. } Equity. No. 1713.

The petition of Samuel A. Peugh, the complainant in the above-entitled cause, respectfully shows that on the 30th day of October, A. D. 1882, this court passed a decree in this cause appointing Henry E. Davis trustee to make sale of squares Nos. 910 & 911 for cash, & with the discretion to sell either as an entirety or by squares, or by lots, to pay Henry S. Davis, Esq., the sum of $11,571.95, with interest and costs of suit, provided said sum is not paid on or before the first Monday of January next. Your petitioner further shows and represents that said decree should be so amended as to direct said trustee to sell said property by lots, and to sell so many as may (be) necessary to pay the indebtedness found by the decree of the court, and no more; that when enough of said lots shall be sold that will satisfy the decree of this court, then the trustee should stop; that said decree should be further amended, so that instead of selling the entire property for cash, thereby preventing competition in
421 bidding, it should be sold for one-third of the purchase money in cash, and the balance in two equal instalments of six & twelve months, secured by the purchaser's notes, at six per cent. per annum. It is further respectfully submitted that inasmuch as the decree involves the sale of a very large quantity of real estate, and to which complainant is deeply interested, that a co-trustee should be named and appointed by the court to represent the interest of this complainant, with whom the complainant can converse and transact such business as must necessarily grow out of this controversy.

The petitioner therefore prays that your honors will consider this petition and grant the relief asked.

SAMUEL A. PEUGH.

J. J. JOHNSON,
Of Counsel for Complainant.
M. F. MORRIS,
Solicitor, & of Counsel for Complainant.

[Endorsed:] Eq. Doc. 9. No. 1713. Peugh *vs.* Davis. Petition for amending decree. 83 | 1 | 2, ordered to be filed in the cause and dismissed. 4 M. G. T., 360. Filed Jan. 2, 1883. R. J. Meigs, clerk.

122 In the Supreme Court of the District of Columbia. In General Term.

SAMU'L PEUGH, Compl't, *ag'st* HENRY S. DAVIS, Def't. } Eq. 1713.

And now comes the defendant, by his solicitor, and moves the court to change the terms of the sale of the property herein involved, being squares numbered 910 & 911, in the city of Washington, heretofore fixed, and to fixed the said terms as follows: The said property to be sold in lots, as in the recorded subdivision, or in smaller subdivisions, if necessary or desirable in order to an advantageous sale, and payment to be made by the purchaser or purchasers, one-third (⅓) in cash and the remainder in equal instalments in one (1) and two (2) years, or all cash, at the option of the purchaser or purchasers, the conditions and terms of sale in other respects to remain as heretofore fixed.

H. E. DAVIS,
For the Defendant.

[Endorsed:] Eq. No. 1713. Samu'l A. Peugh, compl't, ag'st Henry S. Davis, def't. Motion to change terms of sale of sq's No. 910 & 911. H. E. Davis, for the def't. Notice served 13 April, '83, and service acknowledged. J. J. Johnson, of counsel for Peugh.

123 In the Supreme Court of the District of Columbia. In General Term.

SAMUEL A. PEUGH, Compl't, *ag'st* HENRY S. DAVIS, Def't. } Eq. No. 1713.

On motion of the defendant, by his solicitor, it is this 27th day of April, 1883, ordered that the terms of the sale of the property involved in the above-entitled cause, as the same has been fixed by the court, be, and the same hereby are, modified as follows: The trustee, Henry E. Davis, appointed to make the sale, is authorized to offer the said premises by lots, as in the recorded subdivision, or in smaller subdivisions of twenty-five (25) feet front, or as near thereabouts as may be practicable, if in his judgment advisable to an advantageous sale; payment to be made, one-third in cash, & the remainder in equal instalments in one (1) and two (2) years (the deferred payments to be secured by deed of trust on the portions sold), or all cash, at the option of the purchaser or purchasers; a deposit of $50 to be made on each lot or subdivision sold; the terms of sale, as heretofore fixed, to remain in other particulars unchanged,

and the said cause is remanded to the special term for further action on the coming in of the trustees' report of the sale, as ordered.

By the court:

D. K. CARTTER, *Ch. Jus.*

[Endorsed:] Eq. No. 1713. Samu'l A. Peugh, compl't, ag'st Henry S. Davis, def't. Order modifying terms of sale and remanding cause to special term on coming in of trustees' report. 4 M. G. T., 433. Filed April 27, 1883. R. J. Meigs, clerk.

424

Copy.

In the Supreme Court of the District of Columbia, the —— day of ——, 188–.

SAMUEL A. PEUGH *vs.* HENRY S. DAVIS. } In Equity. No. 1713. In Error.

Know all men by these presents, that I, George E. Kirk, am bound unto the above-named Henry S. Davis in the sum of three thousand dollars, to be paid to the said Henry S. Davis, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this —— day of ——, 188–.

Whereas the above-named Samuel A. Peugh has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Samuel A. Peugh shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

GEORGE E. KIRK.

Sealed and delivered in presence of—
CHARLES P. WEBSTER,
Notary Public.

DISTRICT OF COLUMBIA, *ss:*

On this —— day of May, 1883, appears George E. Kirk, a resident of said District, who, being by me duly sworn, deposes & says that he is worth three thousand dollars in real estate in said District over and above all his just debts & obligations.

Subscribed & sworn to before me, this 9th day of May, 1883.

[SEAL.] CHARLES P. WEBSTER,
Notary Public.

I approve this bond, to act as a supersedeas.

SAM. F. MILLER,
Justice Sup. Court U. S.

May 10, 1883.

[Endorsed:] 1713. Eq. Doc. 9. Peugh *vs.* Davis. Bond of George E. Kirk. ($3,000.) Filed May 10th, 1883. R. J. Meigs, clerk.

425 In the Supreme Court of the District of Columbia, the —— day of ———, 188–.

SAMUEL A. PEUGH *vs.* HENRY S. DAVIS. } No. 1713. Equity Doc. 9. In Error.

Know all men by these presents that I, John Patch, Samuel A. Peugh, & Caroline S. Peugh, are bound unto the above-named Henry S. Davis in the sum of two thousand dollars, to be paid to the said Henry S. Davis, his executors or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 23d day of November, 1882.

Whereas the above-named Samuel A. Peugh has prosecuted his appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Samuel A. Peugh shall prosecute his said cause to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void: otherwise, the same shall be and remain in full force and virtue.

SAMUEL A. PEUGH. [SEAL.]
CAROLINE S. PEUGH. [SEAL.]
JOHN PATCH. [SEAL.]

Sealed and delivered in presence of—
—— ——.

On this 23d day of November, 1882, appears John Patch, who, being duly sworn, deposes & says: That he is worth three thousand in real estate in this District over and above all just liabilities.

JOHN PATCH.

Subscribed & sworn before me, this 23 November, 1882.

WM. HELMICK, [SEAL.]
Justice of the Peace.

426 I approve this bond to operate as a supersea*da* May 10th, 1883.

SAM'L F. MILLER,
Justice Sup. Court U. S.

[Endorsed:] 1713. Eq. doc. 9. Peugh *vs.* Davis. Bond of John Patch, $2,000. Filed May 10th, 1883. R. J. Meigs, clerk.

427 In the Supreme Court of the District of Columbia, the — day of ——, 188–.

SAMUEL A. PEUGH }
vs. } Equity. No. 1713. In Error.
HENRY S. DAVIS. }

Know all men by these presents that I, Jeremiah C. Sotz, am bound unto the above-named Henry S. Davis in the sum of three thousand dollars, to be paid to the said Henry S. Davis, his executors or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 11th day of Janu'y, 1883.

Whereas the above-named Samuel A. Peugh has prosecuted his appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above named — shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

JEREMIAH C. SOTZO.

Sealed and delivered in presence of—
A. S. TAYLOR.

DISTRICT OF COLUMBIA:

On this 11th day of Janu'y, 1883, appears before me Jeremiah C. Sotzo, who, being by me duly sworn, deposes & says: That he is worth between three & four thousand dollars in real estate in said District, said real estate being part of lot 29, in sq. 729.

JEREMIAH C. SOTZ.

Subscribed & sworn to before me, this 11 day of Janu'y, A. D. 1883.

A. S. TAYLOR, [SEAL.]
Justice of the Peace.

I approve this bond, to operate as a supersedeas.

SAM'L F. MILLER,
Justice Sup. Court U. S.

[Endorsed:] 1713. Eq. Doc. 9. Peugh *vs.* Davis. Bond of Jeremiah C. Sotz, $3,000. Filed May 10, 1883. R. J. Meigs, clerk.

428 DISTRICT OF COLUMBIA, *to wit:*

To Henry S. Davis:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal from a

decree of the supreme court of the District of Columbia, wherein Samuel A. Peugh is appellant and you are defendant, to show cause, if any there be, why the decree mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness Sam'l F. Miller, Justice of the said Supreme Court of the United States.

May 10, 1883.

SAM'L F. MILLER,
Justice Sup. Court United States.

Served copy of the within citation on Henry S. Davis Oct. 8, 1883.

CLAYTON McMICHAEL,
U. S. Marshal.

DISTRICT OF COLUMBIA, *to wit:*

To Henry S. Davis:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Samuel A. Peugh is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

May 10, 1883.

D. K. CARTTER,
Ch. Justice.

Served on Henry E. Davis May 10, 1883; Henry S. Davis, Oct. 8, 1883.

CLAYTON McMICHAEL,
U. S. Marshal.

429 WASHINGTON, D. C., *January 12th*, 1883.

R. J. MEIGS, JR., Esq.

MY DEAR SIR: In the case of Peugh *vs.* Davis, No. 1713, equity, I am willing to indorse Mr. Peugh's transcript of the record as correct. I am satisfied that it is to his interest to make it correct.

Yours, truly, M. F. MORRIS.

430 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court, this 10th day of October, 1883.

[SEAL.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

Justice's Certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal, this 10 day of October, 1883.

[SEAL.]

D. K. CARTTER,
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court, this 10th day of October, 1883.

[SEAL.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

431 Supreme Court of the District of Columbia. Sitting in General Term, January 7, 1884.

The justices of said court (denominated "judges" in the annexed certiorari), for answer to the mandate in said certiorari contained, after searching the record and proceedings in said cause, hereby certify that the following omissions, apparent from the said transcript of record, are to be found upon the records of this court, and are herewith supplied, in obedience to said mandate.

[SEAL.]

D. K. CARTTER,
Chief Justice.
ANDREW WYLIE,
A. B. HAGNER,
WALTER S. COX,
ARTHUR MACARTHUR,
CHARLES P. JAMES,
Associate Justices.

432 1. Supreme Court of the District of Columbia.

SAMUEL A. PEUGH *ag'st* HENRY S. DAVIS. } 1713. Equity.

The clerk will please enter an appeal to the court in general term from the decree of the special term in this cause.

H. E. DAVIS, *for Def't.*

Oct. 21st, 1881.

Appeal as ordered. Entered by the clerk.

2. Supreme Court of the District of Columbia. Sitting in General Term, January 2d, 1883.

Session resumed pursuant to adjournment. Present: Chief Justice Cartter and Justices Cox and James.

Among other proceedings the following was had:

SAMUEL A. PEUGH
vs.
HENRY S. DAVIS. } Equity. No. 1713.

Upon consideration of the complainant's petition, praying for certain amendments of the decree of this court, pronounced herein on the 30th of October last, the court orders that said petition be filed in the cause; and further, that it be, and hereby is, dismissed.

433 3. Supreme Court of the District of Columbia. Sitting in General Term, December 19, 1881.

Present: Chief Justice Cartter, and Justices MacArthur and James.

The following among other proceedings were had:

General Term—Times of Holding.

Ordered, that hereafter the general terms shall commence on the fourth Mondays of January and April and the first Monday of October, respectively, instead of the first Monday of January, the third Monday of April, and fourth Monday of September, as at present.

4. Supreme Court of the District of Columbia. Sitting in General Term, January 20, 1883.

Session resumed pursuant to adjournment. Present: Chief Justice Cartter, and Justices Cox and James.

After certain proceedings in said court were had, the following appears:

Adjourned without day.

434 THE UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the supreme court of the District of Columbia, Greeting:

Whereas in a certain suit in said supreme court, between Samuel A. Peugh, complainant, and Henry S. Davis, defendant, No. 1713, in equity, which suit was removed to the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"1. That the order of appeal in behalf of the said Henry S. Davis, on the 21st day of October, 1881, to the general term of the supreme court of the District of Columbia from the decree passed by the special term of the said court in the cause numbered 1713, in equity, in the said court, wherein the said Samuel A. Peugh was complain-

ant and the said Henry S. Davis defendant, and the entry of the said appeal as ordered, of record in the said supreme court of the District of Columbia, is omitted from the transcript.

435 2. That the order made by the said supreme court of the District of Columbia, in general term, on the 2d day of January, 1883, that the certain petition of the said Samuel A. Peugh, complainant as aforesaid, praying for certain amendments of the decree of the said court, pronounced in the said cause on the 30th day of October, 1882, be filed, and that the same be dismissed, of record in the said supreme court of the District of Columbia, is omitted from the said transcript.

3. That the order made by the said supreme court of the District of Columbia, in general term, on the 19th day of December, 1881, that thereafter the general terms of the said court shall commence on the fourth Mondays of January and April and the first Monday of October, respectively, instead of the first Monday of January, the third Monday of April, and the fourth Monday of September, as on the said 19th day of December, 1881, of record in the said supreme court of the District of Columbia, is omitted from the said transcript.

4. That the adjournment without day on the 20th day of January, 1883, of the general term of the supreme court of the District

436 of Columbia, of record in the said supreme court of the District of Columbia, is omitted from the said transcript:"

You, therefore, are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions to the extent above enumerated you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, the eighteenth day of December, A. D. 1883.

[SEAL.] JAMES H. McKENNEY,
Clerk Supreme Court U. S.

437 [Endorsed:] 1713. Eq. doc. 9. Peugh *vs.* Davis. Certiorari from S. C. of U. S. and return. Supreme Court U. S. 1883, October term. No. 1172. Samuel A. Peugh, app'l't, *vs.* Henry S. Davis. Certiorari & return. Office Supreme Court U. S. Filed Jan. 7, 1884. James H. McKenney, clerk.

438 In the Supreme Court of the United States. October Term, 1884.

SAMUEL A. PEUGH, Appellant,
vs.
HENRY S. DAVIS, Appellee, } No. 756.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause, by their respective counsel, that the said cause may, with the permission of the Court, be heard upon the following portions of the record, and that such portions and no other may be printed by the appellant for hearing, viz:

1. Bill and answer.

(Thereupon testimony was taken, and the court below dismissed the bill. This court upon appeal reversed that decision, and decreed that the deed given by the complainant to the defendant was in effect a mortgage. See report of the case in 96 U. S., pp. 332–9.)

2. Mandate of the Supreme Court of the United States to the supreme court of the District of Columbia.

3. Order of the supreme court of the District of Columbia referring the cause to the auditor, Thomas Hood.

4. Report of Thomas Hood, auditor, with amounts found due, but without schedules.

439 5. Testimony taken by Thomas Hood, auditor, except transcript from Treasury Department, and omitting special tax bill.

6. Order of Justice Cox setting aside report of Auditor Hood, and referring cause to Auditor James G. Payne.

7. Report of James G. Payne, auditor, with amounts found due, but without schedules.

8. Testimony taken by James G. Payne, auditor.

9. Decree of Wylie, J. (omitting directions in regard to sale as per stipulation).

10. Decision of supreme court of the District of Columbia, in general term, and its decree (omitting directions in regard to sale, as per stipulation).

10. Appeal to the Supreme Court of the United States.

T. T. CRITTENDEN,
Of Counsel for Appellant:
A. G. RIDDLE,
Counsel for Appellee.

440 [Endorsed:] Supreme Court U. S., 1884, October term. No. 756. Samuel A. Peugh, app't, *vs.* Henry S. Davis. Stipulation to omit parts of record in printing. Office Supreme Court U. S., filed Dec. 1, 1884. James H. McKenney, clerk.

Endorsed on cover: District of Columbia supreme court. No. 756. Samuel A. Peugh, appellant, *vs.* Henry S. Davis. Filed 22d October, 1883.

In the Supreme Court of the District of Columbia.

SAMUEL A. PEUGH, *vs.* HENRY S. DAVIS.	}	In Equity, No. 1,713. Doc. 9.

SCHEDULE "A."

Samuel A. Peugh, (complainant.)

To Henry S. Davis, (defendant.) Dr.

1857.				
May	6.	For money loaned this amount - -	$1,500.00	
	"	Interest on same at 6 per cent. to Nov. 1st, 1865, date of tender, 8 yrs., 5 mo., 25 ds.		$763.75
1858.				
Feb.	9.	For money loaned this amount - -	500.00	
	"	Interest on same at 6 per cent. to Nov. 1st. 1865, date of tender, 7 yrs., 8 mo. 22ds.		231.83
July	28.	For paid taxes for the year 1857, as follows:		
	"	Redemption certificate $13.40,$11.78, $25.18 Tax year ending		

		1858, T. F. C. $20.06	45.24	
		Interest on same from date to Nov. 1st. 1865, 7 yrs. 3 mo. 3ds.		19.70
Nov.	2.	Paving Tax	281.32	
	to	Interest on same Nov. 1st. 1865, 6 yrs. 11 mo. 29 ds.		118.11
		Amounts carried forward	$2,326.56	$1,133.39

SCHEDULE "A" CONTINUED.

1858.				
		For amounts brought forward	$2,326.56	$1,133.39
1859.				
Dec.	19.	For Paid Tax for year ending 1859, T. F. C.	$28.06	
		Interest on same to Nov. 1st. 1865, 5 yrs. 10 mo. 12 ds.		$9.88
1860.				
July	25.	For Tax, year ending 1860, Exhibit T. F. C.	28.87	
		Interest on same to Nov. 1st. 1865, 5 yrs. 3 mo. 6ds.		9.12
Sept.	25.	For Tax, year ending 1861.	18.77	
		Interest on same		

		to Nov. 1st. 1865, 5 yrs. 1 mo. 6 ds.		5.74
1862.				
Sept.	27.	For Tax, year ending 1862	29.81	
		" Interest on same to Nov. 1st. 1865, 3 yrs. 1 mo. 4 ds.		5.53
1863.				
Sept.	3.	For Tax, year ending 1863	29.81	
		" Interest on same to Nov. 1st. 1865, 2 yrs. 1 mo. 28 ds.		3.87
1864.				
Sept.	10.	For Tax, for year ending 1864,	52.85	
		" Interest on same to Nov. 1st. 1865, 1 yr. 1 mo. 21 ds.		3.62
1865.				
Aug.	31.	For Tax, for year ending 1865	48.05	
		" Interest on same to Nov. 1st. 1865 2 mos.		.48
		Total loans and taxes	$2,562.78	
		Interest - - - - - - -		$1,171.63
		Aggregate - -	$3,734.41	

SCHEDULE "A" CONTINUED.

CREDITS.

First.—Use and occupation.
Rent from Nov. 1st, 1865, to April 13th, 1877, (date of judgment of U. S. S. C.), as follows:

1866.				
Nov.	1.	By use and occupation. Rent one year to date, of square 910 and 911, at a rental of 6 per cent. on the assessed value for the year 1866, of $5,338.00 the defendant paying all taxes - - -	$320.28	
		" Interest on same from Nov. 1st, 1866, to Dec. 1st, 1879, 13 years 1 month -	251.42	
				$571.70
1867.				
Nov.	1.	By same for the year ending Nov. 1st, 1867 - - -	320.28	
		Interest to Dec. 1, 1879, 12 years 1 month, - -	232.20	
				$552.48

1868.			
Nov. 1.	By same for year ending Nov. 1, 1868	320.28	
	" Interest to Dec. 1, 1879, 11 years 1 month - -	212.98	
			$533.26
1869.			
Nov. 1.	By same for year ending Nov. 1st, 1869, the assessed valuation for this year being $8,665.00 -	519.90	
	Interest on same to Dec. 1, 1879, 10 yrs. 1 month - -	314.54	
			$834.44
1870.			
Nov. 1.	By same for year ending Nov. 1st, 1870	519.90	
	" Interest to Dec. 1, 1879, 9 years 1 month - - - - -	283.35	
			803.25
Amount carried forward - -			$3,295.13

SCHEDULE "A" CONTINUED.

1870.		
	By amount brought forward	$3,295.13
1871.		
Nov. 1.	By same for the year	

	ending Nov. 1st, 1871 - - -	519.90	
	" Interest to Dec. 1st, '79, 8 yrs. 1 month	252.15	
			$772.05
1872.			
Nov. 1.	By same for year ending Nov. 1, 1872 -	519.90	
	" Interest to Dec. 1st, 1879, 7 yrs. 1 month	220.95	
			740.85
1873.			
Nov. 1.	By same for the year 1873, ending Nov. 1, the assessed value of said squares for this year being $17,054 - - -	1,023.24	
	" Interest to Dec. 1, 1879, 6 yrs. 1 month	373.48	
			$1,396.72
1874.			
Nov. 1.	By same for the year ending Nov. 1st, 1874, the assessment being $17,408.00 - - -	1,044.48	
	" Interest to Dec. 1; '79, 5 yrs. 1 month	318.57	
			$1,363.05

1875.			
Nov, 1.	By same for the year ending Nov. 1st, 1875 - - -	1,044.48	
	" Interest to Dec. 1st, '79, 4 yrs. 1 month	255.90	
			$1,300.38
1876.			
Nov. 1.	By same for the year ending Nov. 1st, 1876, the assessment being $22,959 - - -	1,377.54	
	" Interest to Dec. 1st, '79, 3 yrs. 1 month	254.85	
			$1,632.39
1877.			
Nov. 1.	By same for the year ending Nov. 1, '77	1,377.54	
	" Interest to Dec, 1, '79, 2 yrs. 1 month	172.19	
			$1,549.73
1878.			
April 15	By same for the five and one-half mos. to date of decree of U. S. S. Court -	631.37	
	" Interest to Dec. 1st, '79, 1 yr. 7 m. 16 ds.	61.86	
			$693.23
			$12,743.53

SCHEDULE "A" CONTINUED.

CREDITS.

Second.—Money paid on account of loan and collected from Government, as follows, viz.:

1857.				
July	6.	By cash paid as interest on loan of May 6th, 1857, and here regarded, as a payment on said loan as decreed by the U. S. S. Conrt.	$112.50	
		" Interest to Dec. 1st. 1879, 22 yrs. 4 mo. 25 ds:	151.22	
				$263.73
Sept.	6.	By cash this day, and regarded as above	112.50	
		Interest to Dec. 1st. 1879, 22yrs. 2 mo. 25 ds.	150.09	
				$262.59
1875.				
May	11.	By this amount, collected of the Government for Fence, used as per Exhibit "B"	25.00	
		Interest to Dec.		

	1st. 1879, 4 yrs. 6 mos. 20 ds. - -	6.84	
			$31.84
1876.			
Aug. 13.	By this amount, collected of the Government for rent from Sept. 1st, 1861, to Oct. 31st, 1865, as per Exhibit "B"	1,241.82	
"	Interest to Dec. 1, 1879, 3 years 3 mos. 8 ds. - -	243.81	1,485.63
			$2,043.78

SCHEDULE "A" CONTINUED.

CREDITS.

Third.—Money paid by complainant for costs as follows, viz.:

1869.			
July 12.	By amount, clerk of the District Court, paid in advance, Nov. 1st. - -	$10.00	
"	Interest to Dec. 1st. 1879, 10 yrs. 4 mos. 19 ds. - - -	6.23	
			$16.23

1872.				
June	27.	By Paid R. D. Mussey, Examiner - -	35.00	
		" Interest to Dec. 1st. 1879, 7 yrs. 5 mos. 4 ds. - -	15.60	
				$50.60
1875.				
Jan.	19.	By Paid Republic Job Printing Office, Nov. 4th. - - -	57.25	
		" Interest after 90 days, April 19, 1875, 4 yrs. 7 mo. 12 ds. - - -	15.86	
				$73.11
1875.				
Oct.	15.	By Paid L. P. Williams' Bill, copying voucher No. 5. - -	195.00	
		" Interest to Dec. 1st, 1879, 4 yrs. 1 mo. 16 ds. - - - -	48.30	
				$243.30
1873.				
Aug.		By paid A. S. Worthington, Examiner, his bill, and is bill		

	voucher 3 - - - -	160.00	
	" Interest from Sept. 1, '73 to Dec. 1, '79, 6 yrs. 3 mos. - - -	60.00	
			$220.00
1879.			
Nov. 4.	Bill of costs in Clerk's Office, - - - - -	33.55	
	Marshal, $5; Sol. $10	15.00	
	Stating account - -	50.00	
			$701.79

SCHEDULE "A" CONTINUED.

RECAPITULATION.

For total debits brought forward, page 2 - - - - -	$3,734.41	
By use and occupation, rent brought from page 4 - - -		$12,743.53
For money received on account of loans, and collected of U. S. Government, brought from page 5		2,043.78
For money for costs of suit, brought from page 6		701.79
For balance card. down	11,754.69	
	$15,489.10	$15,489.10
By balance due complainant brought down - - - -		$11,754.69

SCHEDULE "B."

In the Supreme Court of the District of Columbia.

SAMUEL A. PEUGH, *es* HENRY S. DAVIS.	}	In Equity, No. 1,713. Doc. 9.

SCHEDULE "B."

Samuel A. Peugh, (complainant.)
Henry S. Davis, (defendant.) Dr.

1857.				
May	6.	For money loaned this amount - -	$1,500	
		Interest on same at 6 per cent. to Nov. 1st, 1874, nearest terminal yr. when use and occupation rent will equal defendant's loans and interest, 17 yrs. 5 mos. 25 ds. - - -		$1,573.75
1858.				
Feb.	9.	For money loaned this amount - -	500.00	
		" Interest to Nov. 1st, 1874, 16 yrs. 8 mos. 22 ds. - - -		501.83
July	28.	For paid taxes for year 1857, and the year ending 1858, $13.40, $11.78, $20.06 - -	45.24	

	" Interest to Nov. 1st, 1874, 16 yrs. 3 mos. 3 ds. - - - - -		44.23
Nov. 2.	For paving taxes	281.32	
	" Interest to Nov. 1st, 1874, 15 years 11 mos. 29 ds. - -		270.02
1859.			
Dec. 19.	For tax, year ending 1859 - - - -	28.06	
	" Interest to Nov. 1st, 1874 - -		25.03
	Amounts carried forward	$2,354,62	$2,414.86

SCHEDULE "B" CONTINUED.

1859.			
	For amounts brought forward	$2,354.62	$2,414.86
1860.			
July 25.	For paid tax, year ending 1860, - -	28.87	
	" Interest to Nov. 1st, '74, 14 yrs. 3 mos. 6 ds. - - -		24.72
Sept. 25.	For tax, year ending 1861 - - -	18.77	
	" Interest to Nov. 1st, 1874, 14 ys. 1 mos. 6 ds. - - -		15.88
1862.			
Sept. 27.	For tax, year ending 1862 - - -	29.81	

	" Interest to Nov. 1st, 1874, 12 yrs. 1 mos. 4 ds. - - -		21.63
1863.			
Sept. 3.	For tax ending 1863	29.81	
	" Interest to Nov. 1st, 1874, 11 yrs. 1 mo. 28 ds. - - -		20.01
1864.			
Sept. 10.	For tax, year ending 1864 - - -	52.85	
	" Interest to Nov. 1st, 1874, 10 yrs. 1 mo. 21 ds. - - -		32.16
1865.			
Aug. 31.	For tax, year ending 1865 - - -	48.05	
	" Int. to Nov. 1, '74 -		26.43
	Loans and taxes - -	$2,562.78	
	Interest to Nov. 1st, 1874 - - -		$2,555.69
	Aggregate - -	$5,118.47	

SCHEDULE "B" CONTINUED.

CREDITS.

First.—Use and occupation, rent, from Nov. 1st. 1865. to April 15th, 1878, date of judgment of U. S. S Court. as follows:

1866.				
Nov.	1.	By use and occupation, rent of squares 910 and 911, to date, at a rental of 6 per cent. net, on the assessed value, which for years 1866,1867, 1868 was $5,338.00	$320.28	
		" Interest to Nov.1st. 1874, 8 yrs. - -	153.73	
				$474.01
1867.				
Nov.	1.	do. For year ending Nov. 1st, 1867 - -	320.28	
		" Interest to Nov. 1st. 1874, 7 years - -	134.52	
				$445.80
1868.				
Nov.	1.	do. For year ending Nov. 1st, 1868 - -	320.28	
		" Interest to Nov. 1st. 1874, 6 years - -	115.30	
				$435.58
1869.				
Nov.	1.	do. For year ending Nov. 1st, 1869, the assessed valuation for 1869, 1870-'71, '72, being $8,665.00	519.90	

		" Interest to Nov.1st, 1874, 5 years - -	155.97	
				$675.87
1870.				
Nov. 1.	do.	For year ending Nov. 1st, 1870 - -	519.90	
		" Interest to Nov. 1st, 1874, 4 years - -	124.77	
				$644.67
1871.				
Nov. 1.	do.	For year ending Nov. 1st, 1871,- -	519.90	
		" Interest to Nov. 1, 1874, 3 years - -	93.58	613.48
				$3,298.41

SCHEDULE "B" CONTINUED.

1871.		By and credits brought forward - - -		$3,298.41
1872.				
Nov. 1.	do.	For year ending Nov. 1st, 1872 - -	519.90	
		" Interest to Nov.1st. 1874, 2 years - -	62.39	
				$582.29
1873.				
Nov. 1.	do.	For year ending Nov. 1st, 1873, the assessment for '73		

	being $17,054.00 - -	1,023.24	
	" Interest to Nov. 1st. 1874, 1 year -	61.39	
			$1,084.63
1874.			
Nov. 1.	do. For year ending Nov. 1st. 1874, the assessment for 1873, being $17,408.00. - - - -		1,044.48
	Total credits to Nov. 1st. 1874. -		6,009.61
	Deduct debits brt. from page 2, this Schedule. - -		5,118.47
	By Balance due on account, use and occupation, rent Nov. 1st. 1874. -		891.14
	" Interest to Dec. 1st, 1879, 5 yrs. 1 mo. -		271.81
1875.			
Nov. 1.	Use and occupation, rent, year ending Nov. 1st. 1875, assessment being $17,408.00. - -	1,044.48	
	" Interest on same to Dec. 1st. 1879, 4 yrs. 1 mo. - -	255.90	
			$1,300.38

1876.				
Nov. 1.	do.	For year ending Nov. 1st. 1876, the assessment being $22,959.00 -	1,377.54	
	"	Interest to Dec. 1st, 1879, 3 yrs. 1 mo.	254.85	
				$1,632.39
1877.				
Nov. 1.	do.	For year ending Nov. 1st, 1877 - -	1,377.54	
	"	Interest to Dec. 1st. 1879, 2 yrs. 1 month - - -	172.19	
				$1,549.73
1878.				
April 15.	do.	For the first and half months to date of decree of U. S. S. Court - - -	631.37	
	"	Interest to Dec. 1, 1879, 1 year 7 mo. 16 ds. - -	61.86	693.23
Carried forward - - -				$6,338.67

SCHEDULE "B" CONTINUED.

By balance, use and occupation, rent to date of decree of U. S. S. Court, with in-

terest to Dec. 1, '79, brought forward -	$6,338.67
Second.—Money paid on account of loans and collected of U. S. Gov't, brought from schedule "A," p. 5	2,043.78
Third.—Money paid, costs brought from schedule "A," page 6 - -	701.78.
	$9,084.34

[COPY.]

The above is a true copy made by me from the original report of Thomas Hood, late Auditor.

S. A. PEUGH.

Subscribed and sworn to before me this 22nd day of January, A. D. 1885.

[SEAL.] WM. HELMICK.

Supreme Court of the United States.

—*OCTOBER TERM*, 1884.—

SAML. A. PEUGH, *Appellant*
vs.
HENRY S. DAVIS, *Appellee.*
No. 756.

Brief for Appellant.

MERRICK & MORRIS,
T. T. CRITTENDEN,
LUTHER H. PIKE,
Attorneys for Appellant

Milans, Pr., 519 7th St., N. W.

Supreme Court of the United States.

—*OCTOBER TERM*, 1884.—

SAML. A. PEUGH, *Appellant*
vs.
HENRY S. DAVIS, *Appellee.*
No 756.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This case having been before the court heretofore, there seems no necesity for an elaborate statement of facts, it having been decided at the October Term of 1877. It is now before the court for an interpretation of its decree made April 15th, 1878, The mandate of the court seems to have been misunderstood and disregarded by the court below. 96 Otto, p, 339.

Peugh borrowed $2,000 of Davis at usurious rate of interest and mortgaged to Davis certain real estate in the City of Washington squares 910 and 911 to secure its payment.

The mortgage was in the form of a deed in fee-simple absolute, and Davis, imagining he had com-

plete advantage of Peugh by the way the deed was drawn, when Peugh came with offer to redeem, declined the offer, entered into posession of the land and set himself up as owner in fee-absolute.

Peugh then filed his bill to redeem. The case travelled through the Supreme Court of the District of Columbia, reached this court and was by it decided, October Term, 1877, and is reported, 6 Otto, 339.

This court adjudged that Davis was never anything but a mortgagee and his assumption of ownership fraudulent.

The substantial part of this court's decision, was in these words: "He (Peugh) has, therefore, a right to redeem the property from the mortgage. In estimating the amount due upon the loan, interest only at the rate of six per cent. per annum will be allowed. The extortionate interest stipulated was forbidden by statute, and would, in a short period, have devoured the whole estate. The defendant (Davis) should be charged with a reasonable sum for the use and occupation of the premises from the time he took possession in 1865, and allowed for the taxes paid and other necessary expenses incurred by him."

The decree of the Supreme Court of the District must be revised, and the cause remanded for further proceedings, in accordance with this opinion.

The case back in the subordinate court went the usual course of proceeding before the auditor, two justices on different hearings in Special Term giving conflicting opinions, and then reached the General Term which holding—Davis having taken particular pains to prove on hearing before the auditor that he had let the property lie idle and unoccupied

and had not tried to sell or lease it—that the question before it was; what the property was worth to Davis from the time he took posession—adjudged thus:

"The real value of the property is not the measure of the use; the returns the property may give the tenant constitute the value of the use, and there is no other guide. We have come to the same conclusions with the witnesses. The use and occupation of the premises was worth nothing, and, therefore, we will charge (Davis) nothing for it."

The court followed with these words:

"But it is said, further, that the mortgagor was deprived of the power to sell the property, that this controversy arrested his dominion over it. Is a claim on that account a claim for use and occupation? For the rental value of the property? Is it not a claim for unliquidated damages, as for obtruding an obstacle in the way of disposing of the property? It seems to us that that is not germane to use and occupation, and to that we are confined."

Mackey's Reports, 2 p. 26.

From this adverse decision, Pough is now appellant to this court.

(THE DECISION OF THE SUPREME COURT OF THE DISTRICT WILL BE FOUND ON THE LAST PAGE OF THE BRIEF, IT HAVING BEEN ACCIDENTLY OMITTED IN THE RECORD.)

Assignment of Errors.

The Court below erred, among other things, in the following particulars:—

1. The appellant says that the Supreme Court of the District erred in holding that the duty it was charged

with, was to ascertain and allow to appellee what the land was worth to him from the time he took possession.

2. That the court erred in holding that the real value of the property was not the measure of the use.

3. That it erred in holding that the returns the property may give the tenant constitute the value of the use and that there is no other guide.

4. That it erred in holding that Peugh's being deprived of his dominion over the land and prevented from making a sale of it by Davis was not germane to the use and occupation of the land by Davis.

5. That it erred in holding that the complainant was not entitled to recover anything for the use and occupationof the property in controversy in this suit, notwithstanding the mandate of this court directing that he should be allowed for such use and occupation.

6. That it erred in disregarding the mandate of this court whereby the complainant, in the account directed to be stated between him and the defendant, was to be allowed a reasonable sum for the use and occupation by the defendant of the property involved in the suit.

7. That it erred in allowing the defendant interest the upon complainant's indebtedness to him after a tender made by the complainant to him and refusal by him to accept.

8. That it erred in rendering a decision in favo rof Davis and against himself.

ARGUMENT.

First Proposition. The mandate of this court to the Supreme Court of the District under the decision

rendered on the former appeal was the law of the case to the latter court. That mandate it did not obey either literally, exactly, or fully.

Whatever was before this court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution as the law of the case. They cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal for error apparent; or intermeddle with it, further than to settle so much as has been remanded; and on a subsequent appeal, nothing is brought up but the proceedings subsequent to the mandate.

Sibbald *v.* The United States, 12 Pet., 492.

This decision of this court was not kept in the mind's eye by the Supreme Court of the District when rendering its decision we have quoted from.

It then stuck to the letter and violated the spirit of the decision rendered by this court at its October Term, 1877.

It fixed the eye upon the words "use and occupation," saw nothing else, and proceeded to render decision upon the narrowest possible grounds.

This court can now say, as it said in Walden *v.* Bodley's Heirs, 9 How., 34, 43: "*We are now called on to construe and execute our own mandate.*" Beyond this we have no power to go, more than the Supreme Court of the District had. "*What that court ought to have done it is our duty to do.*"

The mortgage left in mortgagor Peugh only an equitable title.

His bill in consequence of mortgagee Davis' fraudulent claim of title in fee-simple absolute was to recover the estate from that fraudulent claim and open it to redemption.

The decree, that Davis should be charged with a reasonable sum for the use and occupation, was in fact and law the allowance by the court of equity of an account for rents and profits.

When a man brings his bill in this court, where there is a trust, and upon a mere equitable title, then he shall recover the estate, and the court will give him an account of the rents and profits, and that from the time the title accrued, unless upon special circumstances.

Lord Hardwicke in Dorner *v.* Fortescue, 2 Atk., 282.

The right to mesne profits is a necessary consequence of a recovery of the estate. It is so at law and in equity. It is a mere incident to the principal recovery.:

Emerson *v.* Thompson, 2 Pick., 487.

The circumstance of being obliged to sue in equity does not alter the nature of the action for mesne profits.

Lord Eldon in Reade *v.* Reade, 5 Ves., 750.

When the decree for title, or judgment in ejectment is obtained, the plaintiff has all natural justice on his side, * * * and if, so the mesne profits are consequential upon his obtaining possession.

Same in Pultney *v* Warren, 6 Ves., 87.

Equity allows an account of rents and profits in all

cases, from the time the title accrued, provided, &c.
Green *v.* Biddle, 8 Wheat., 1.
Watts *v.* Waddle, 6 Peters, 389.

Upon what principle is it that defendant upon recovery had from him is made to account for rents and profits?

Why are the mesne profits consequential upon plaintiff's obtaining possession?

The decision of the Supreme Court of the District is an extraordinary one for its complete misconception of what was before it for determination.

Its proposition upsets our gravity.

It is that the question before it was, not remuneration to Peugh for Davis' having taken his property from him with ability to use it and with the duty of trying to make it produce something, but just what and how little use Davis saw fit to make of it.

It is that Davis, by deliberately making no effort to have the property produce something, could successfully escape compensating Peugh for being deprived of his property no matter what Peugh could have done with it had he been allowed to retain possession of it, no matter what loss Peugh suffered by reason of the fraudulent claim of ownership set up by Davis.

We talk about money. What is it? We can't eat it. We can't wear it. Of itself, it will neither warm in chill winter nor cool in parching summer.

Its value is the use made of it.

When one man borrows another's money the compensation is to the lender and that is not measured by the use the borrower makes of it.

For if this were so, then the borrower of one hundred dollars could bury it in a hole and say to the lender I had no use of your money and I am therefore under no obligation to make you any compensation for it.

Whilst, on the other hand, if he were by intelligent use of them to make them produce a million dollars the lender could make him account according to the million.

What is the value of land but the use of it?

"For what," says Lord Coke, "is the land, but the profits thereof?"

Davis took Peugh's land, hid it under a bushel and now says to him I had no use of your land and am therefore under no obligation to compensate you for it. I am under no obligation to pay you a cent for having deprived you of your land, no matter how profitably you could have dealt with it had I not deprived you of it and fraudulently claimed ownership.

Rent and interest are alike in this; that when the recovery of the principal thing establishes that the claimant had right to the possession and use of the land, at and before the commencement of the suit, the rent is an incident of the principal recovery. If one brought an action for the naked *title*, another having the *usufruct*, he could, on judgment for such title, recover no rent, either in that or any other action, because the rent does not flow from a naked title, with a *usufruct* outstanding. But when the action is possessory, decree that he was entitled to possession, proves his right to rent and fruits; just precisely as judgment for a debt proves the right to interest; and then, the rent is an incident to the main relief, just

as interest is. *Rent is the interest of land.* They are both *fruits*, and such is the doctrine of the civil law.

But there is a difference between *rent* and *interest*. Domat says: "We must take care, in applying the preceding rule, not to confound with the interest of money the revenues of another nature, such as the rent of a farm, of a house, and others of the like kind. For these sorts of revenues differ from the interest of money, because the interest of money is not a natural revenue, and is only, *on the part of the debtor, a punishment* which the law inflicts on him for his delay of payment; and *on the part of the creditor* it is *a compensation for the loss which he suffers by lying out of this money;* whereas the price of the fruits of the ground, and of the rents of the house is a natural revenue, which on the part of the debtor is the value of an enjoyment which he thus reaped the benefit of, and on the part of the creditor is a real good, which in his hands makes capital, as his other goods do. *So that the debtor of the rent of a farm, or of a house, justly owes interest for the same, from the time that it has been demanded.*"

There is a general law, declaring that every person in possession of land without the consent and against the will of the rightful owner, shall pay him the fruits. We do not see how the parallel between rent and interest is any the less complete, because the law does not fix the sale per acre, as it does the rate per cent. The only question is, whether it is a parallel case, not for all purposes, or from all points of view; but whether it is so in this, that rent, like interest, is an incident to the recovery of possession of the land.

This from Pomponius, (Lib. 9, ex variis lectionibus;) *jure naturæ æquum est, neminem cum alterius detrimento et injuria fieri locupletiorem. L.* 206, *ff. de diversis regulis.*

The possessor in bad faith is bound to account, not only for the fruits which he *has* received, but for those which he has not received, *but which the true owner would have received if he had had possession. Generaliter, says* Papinian, *quum de fructibus æstimandis quæritur, constat adverti debere, non an mala fidei possessor fruitus sit, sed an petitor frui potuerit, si ei possidere licuisset. L.* 62; *sec.* 1, *ff. de rei. vind. id., No.* 336.

The reason is that the possessor in bad faith, by the knowledge that he has, that the thing does not belong to him, contracts the obligation to restore it to the proprietor; and, for his failure to comply with that obligation, *he is bound for the damages and interest resulting from his obligation*; in which are included those fruits which the proprietor has failed to receive.

Here again *punishment* to the wrong doer, *compensation* to the one wronged.

Duranton says: "The possessor in bad faith not only restores the fruits which he has received; but he accounts for all which he has not received, *but which* a *diligent proprietor would have realized. On this point, the law looks to what the proprietor would have done; inasmuch as he ought not to be deprived, by the act or neglect of the possessor, of what he would have had, if he could freely have enjoyed his own property.*

The possessor originally in good faith being as-

similated to him in bad faith, as soon as the defects in his title are known to him, he must restore the fruits received after that period, *and such as the proprietor would, in reasonable probability, have received. Quia mala fide superveniente, possessores omnes in causa fructuum pares sunt, et quasi prædones teneantur.*

Liv. 2, Tit. 2, Ch. 3, sec. 2, No. 360.

In general, in settling an account of rents and profits, the question is, *not whether the possessor in bad faith could have used the property,* BUT WHETHER THE TRUE OWNER COULD HAVE DONE SO, IF PERMITTED.

There is a difference between the possessor *bonæ fidei* and the possessor *malæ fidei*. There is good reason for it. It has been sufficiently hinted at in the foregoing.

The principle unquestionably is *punishment* to the possessor *malæ fidei*, *compensation* to the wronged.

Peugh's land in his hands had a definite, measurable value as had Davis' dollars in his.

The land had all along an actual cash value. It represented the investment of, was in fact the exact equivalent of so many dollars as good as Davis' loaned ones. This value was always ascertainable.

The State, to obtain revenue, had its value appraised for taxation. Both Davis and Peugh knew this.

But the true test of its value was, how many dollars Peugh could sell it for on a fair, open sale.

Its price upon a fair, open sale would show of just how many dollars it was the equivalent.

Peugh, holding and using rightfully Davis' dollars, is to pay Davis interest at 6 per cent.

Davis, holding under grossly fraudulent claim of ownership, Peugh's land, exact equivalent of so many dollars to him, is—so the Supreme Court of the District would have it—to pay Peugh *nothing*.

This is drawing a distinction between possessor *bonæ fidei* and possessor *malæ fidei* with a vengeance.

It looks to us very much like offering a premium to rascality.

Is it equity that possessor in good faith shall pay and possessor in bad faith go scot free?

We think not. One must have sharp optics to find it so.

Why should not Davis, possessor *malæ fidei*, pay precisely the same interest on Peugh's dollars that Peugh, possessor *bonæ fidei*, has to pay on Davis' dollars.

Equality is equity.

The only difficulty in the case was to determine how many dollars the land of Peugh, in Davis' hands, represented for Davis to pay interest on.

It cannot be denied that under the mortgage Davis had the right to take possession of the mortgaged premises, because neither the contract nor the law of the District secured Peugh the right to remain in possession until foreclosure and deed.

But Peugh's contract was not to pay Davis interest on the loaned money and at the same time be deprived of the possession and use of the land without any consideration or compensation for the deprivation.

But if the mortgagee, after condition broken, take

possession by consent of the mortgagor, it is presumed, in the absence of clear proof to the contrary, that he is to receive the rents and profits and apply these to the debt secured, and that he is to hold possession until the debt is paid.

Entry and possession by the mortgagee can neither abridge nor enlarge the mortgagee's interest, nor convert what was previously a security into a seisin of the freehold.

All Davis was entitled to by his contract was his dollars loaned with interest and repayment of necessary expenditures.

Mortgagee must not get anything out of his mortgage beyond the debt, interest, and expenditures.

Gordon *v.* Lewis, 2 Sumner, 155.

The act of taking possession of the mortgaged premises under a contract that sanctioned it only to enable mortgagee to use it, and make it produce rents and profits, is an assertion that it can and will be used to produce them.

The act of taking possession is a use of value to mortgagor, if in no other way, for the coercion of mortgagee into payment by depriving him of a benefit from the possession and use of the premises.

In this particular it is an assertion that mortgagee having possession and use has thereby some benefit of value to himself from the premises, to deprive him of which will stimulate him to payment.

The contract and the law unite in requiring that mortgagor shall be compensated for this deprivation that is of itself a part of the consideration of the mortgage contract.

Mortgagee having taken and held possession merely as mortgagee is estopped thereby from denying that his possession, occupation, and use of the premises were of no value to him.

It is enough, however, that the deprivation imposed on mortgagor calls for compensation.

Mortgagee cannot be heard to say that his taking possession from mortgagor under the contract did not operate to some extent to mortgagor's disadvantage for which he was bound by the contract to make him compensation.

The decree of the Supreme Court of the District that Davis' use and occupation was of no value to him was a mere evasion of this court's mandate.

As we have seen, mortgagee must not get anything out of his mortgage beyond the debt, interest, and necessary expenditures.

With mortgagee in possession, *qua* mortgagee and acting *bonâ fide*, both he and mortgagor have duties as well as rights in respect to the mortgaged premises.

What are they?

First; as to mortgagee.

This by Lord Erskine in Hughes *v.* Williams, 12 Vesey, 494, a case in which there was no fraud charged against mortgagee, and where it was found that he was not chargeable with even wilful default:

> "*I do not mean to say that to charge a mortgagee in possession, actual fraud is necessary. It is sufficient, if there is plain, obvious and gross negligence, by not making use of facts within his knowledge so as to give the mortgagor the full benefit, that the mortgagee, in possession of the estate of the mortgagor, ought to give him*."

That is to say, he must use it as a prudent, skillful and energetic owner would: He must not hide it under a bushel to lie inactive. He must honestly try to use it so as to make it produce rents and profits. He cannot play the dog in the manger game, neither using the premises himself nor permitting mortgagor to use them without paying for either his amusement or his malice.

Second, as to mortgagor.

Again, from Lord Erskine, Ib: "*Another circumstance that weighs with me is, that the mortgagor, if he knows the estate is under let, ought to give notice to the mortgagee, and to afford his advice and aid, for the purpose of making the estate as productive as possible.*"

That is to say, it is mortgagor's right, interest, and duty to offer mortgagee counsel and assistance for making the premises produce rents and profits.

The contract and the law prohibit mortgagee from getting more than his debt, &c., and require him to use the premises frequently and skillfully. His contract restricts his use to this. The moment he steps beyond this to misuse his mortgage and possession of the land—as, for instance, by setting up fraudulent claim of ownership in fee-simple absolute—that instant he seeks to get more than his debt, &c.; that instant he steps outside his contract and the pale of the law; that instant he stands a possessor *male fidei*.

Now upon many a tract that was "outside," "outlying" in 1872-3, there are stately mansions and rows of well built, inhabited buildings which prove that all the speculations of that period were not abnormal

applications resulting unfortunately. There is no ground for presuming that, had Peugh effected his attempted sale, it would have proven unfortunate to him.

There is no wrong doing in borrowing. But there is in charging usurious rate of interest in violation of the law's mandate.

In this instance the extortioner mercilessly added to his outrage upon the law a most cruel and heinous breach of his trust to his *cestui que* trust.

Baffled in his effort to make effective his attempted fraud, what more natural than to have him whining for leniency, as if he were some poor, confiding, self-sacrificing man?

His plea before the lower court was that a charge of even 1 per cent. on the assessed valuation, in addition to the taxes, was oppressive rather than lenient.

Leniency to extortioners and faithless trustees!

He would have it that courts of equity should be lenient, yea, very tender, towards extortioners and trust breakers.

Davis, before the court below sought to whistle this feature of the case down the wind by asking: "What is market value during a given period?" And answering: "Manifestly the price at which property will sell in response to a normal and healthy demand during that period; not what may be obtained in temporary, speculative, feverish or otherwise abnormal applications."

The answer to all, which is? It was Peugh's right to take advantage of any boom in the price of real estate to sell at the highest price. That is just what

all prudent, sagacious owners who have real estate to sell try to do.

It was his most sacred right to try to secure the largest possible surplus for himself. That was profit from the use of the land.

When Davis assuming all risk saw fit to prevent Peugh's making such a sale he should be made to abide the consequences of his fraudulent conduct. He, not Peugh, should be the sufferer.

Of course, entertaining such motions about what was right, it was easy for him to talk flippantly and ingeniously about his occupation being a lawful though only nominal and valueless one, "*during which the complainant* (Peugh) *would have it inferred he lost a problematical opportunity of unfortunate speculation in* 1872-3."

A very likely thing, indeed, is it for a vendor of real estate to make an unfortunate speculation by selling at high tide in the price of land.

One would think it would be the buyer who would run the risk of making an unfortunate speculation.

Davis conceded that the opportunity did exist for making a sale at high price in 1872-3, but sought to neutralize it by talking about the period being of temporary, speculative, feverish or otherwise abnormal applications, and Peugh losing a problematical opportunity.

Abnormal applications; problematical opportunity, indeed. The testimony does not read that way.

Davis before the court below harped upon the land being "outside," "outlying."

"A villainous Achitophel! A rascally, yea, forsooth knave," to bear a gentleman down and then stand upon "outside" and "outlying."

Let us suppose that Davis had sold the property to a *bona fide* purchaser for valuable consideration without notice, square 910 with its 78,250 square feet, and square 911 with its 78,860 square feet.

Record p. 77;— the former at 25 cents per square foot, 19,562.25; the latter at 30 cents per square foot $23,658, (The testimony is conclusive that Pengh could and would but for Davis' claim and refusal to permit sale have sold at those prices in 1872-3).

Can anyone pretend that Davis would not be bound and held to account to Pengh for those sums with lawful interest from the date of sale, or that a court would patiently listen to Davis' platitudes about a normal, healthy, demand and temporary, speculative, feverish or otherwise abnormal applications?

If so liable in such case, why not so in this; the respective relations being the same in both cases?

Said the Chancellor in Blake vs. Foster, 2 Ball & Beat. marg. p. 403, "*surely there* can be no two things more distinct or *opposite, than possession as mortgagee, and possession as owner of the estate; nor anything be more hazardous or inconvenient, than the possession of a mortgagee; the manner in which he is called to account is most rigorous and severe.*"

He said: "*If a mortgagee enter into possession of the lands, he is always charged with the utmost value they are proved to be worth.*"

Lord Trimbeston vs. Hamill, 1 Ib., 385.
Moroney vs. O'Dea, 1 Ib., 118.

It is true that in contemplation of law Davis from

1865, to this court's decision, April 15, 1878, was only a mortgagee in possession. But in point of fact he was during that period a trespasser claiming falsely and fraudulent ownership in fee-simple absolute adversely to Peugh. Peugh had to resort to legal proceedings to break down this claim that was for more than the mortgage gave him.

Such being the case, is not his accounting to be more rigorous and severe than that of mere mortgagee in posession?

But why further discuss what seems to us a most plain, reasonable equitable proposition?

Let us see what the testimony shows: first, saying to the court that we think these cases sustain the views here presented.

Fears vs. Merrill, 9 Ark., 559.

Apalachicola vs. Apal. Land Co., 9 Fla., 340.

Dormer vs. Fortescue, 3 Atkys., 128, sustains the proposition that under a proper bill—an ejectment bill for posession, a feature in this case because Davis' false and fraudulent claim to ownership had to be overcome—an account for mesne frofits can be had in a court of equity.

Hilbrant vs. Brewer, 6 Texas, 45.

5 Ib., 141.

Bank of Montgomery vs Reese, 2, Casey Pa.

In an action to recover *Mesne profits*, the plaintiff, to show what the profits are, may either prove the profits received from the land, or the probable value of the land.

West vs Hughes, 1 H, & J. 574.

"Upon the principal before explained, Strike must be charged with the rents and profits, or full value of the property in question from etc."

Strike vs. McDonald, 2 Har. & Gill, 239.
Ib. 222, 223.

Mr. Davis' claim before the court below was, that he received no rents whatever from the property, of which he made and could make no use whatever, and that he was nominally and only nominally in possession of it.

As seen in last page of brief that was the ground on which the court below decided in his favor and we need not canvass testimony on these points.

We first point out that showing that in 1872 and 1873 the property could have been sold, square 910 for 25, and 911 for 30 cents per square foot.

F. C. Cate, Record p. 73 testified that in 1872 he was prepared to offer thirty cents a foot for square 911, and twenty-five cents for 910.

J. N. Callan, Record p. 61-62; testified that he was able to and did fix the approximate value of square 911 between the years 1865 and 1871 at from 25 to 35 cents per foot, and gave it as his opinion that during that time square 911 would average form five to ten cents more in value than 910.

S. J. Bowen, (former Mayer of the City,) Ib. p. 70. That half of the square 911, fronting on H street, would have brought, in his estimation, from 1865 to 1872 from *twenty-five* to *thirty cents*; and that the half of the square 910, fronting on K street would be worth as much.

E. A. McIntyre, Real Estate Broker, Ib. p. 75. That during the time from 1865, to spring of 1878 he would

say the valueof squares 910 and 911 varied. That in the early partits worth would be from *25 to 30 cents* per square foot; 30 for the south (911) and 25 for the north (910.)

F. W. Jones, Record p. 69, who in April, 1875, sold square 932 immediately east of 910 at 24 cents a foot. That square 910 was worth a little more than square 932, as he supposed any where from 8 to 10 or 12 per cent.

He fixed it at about 10 per cent giving his reasons for square 910, being of greater value.

The testimony of Mr. Peugh is that he had offers for the lease, rent or purchase of both squares at such prices as to exceed in the aggregate $40,000, and that but for the unlawful claim of the defendant Davis could have realized more than that for the two squares.

Moses Kelly, Ib., p. 18. That he was in 72-73 desirous of purchasing square 911, being willing to pay 25 cents per foot for it, but was told that no proposition for its purchase could then be entertained for it. Pages 66, 67, he repeats this; saying p. 67, that if he recollected aright he made application to purchase of Mr. Peugh and "I made application through Wilson E. Brown to Mr. Davis and the answer was that the matter was in litigation, and no proposition would be received."

R. W. Downman, Ib., p. 87, that about 1872 when property was at the highest, he was authorized once to see Mr. Davis in reference to the purchase of square 911, and that Mr. Davis said the square was not for sale, and the matter dropped through.

He said, p. 90, it was Mr. James C. Kennedy (now dead) who authorized him to approach Mr. Davis.

This property consists of two squares of ground, Nos. 910 and 911, containing over $157,000 square feet.

The Columbia, or H street railroad, runs immediately south of square 911.

The opposite side of it on the south is entirely built upon with good three-story brick houses, and an Episcopal Mission Church, and has been over ten years, and a Presbyterian Church one square south.

The east side is entirely built up with good two-story brick houses, and a good Methodist Episcopal Church, one square east.

The west side is entirely built up with good frame and bricks, and a public school has been for years.

These improvements have existed for years, during Davis' unlawful holding, and not a foot of this ground but would have been built upon, otherwise.

This is the outlying ground so valueless as he would make believe.

The testimony shows it, Record pp.——

But then what more natural—the fraudulent claim of ownership having fallen through—than for the baffled and chagrined projector of it to be found dying hard and seeking with might and main by "outlying" to escape his responsibility.

Upon being made to account as such faithless trustee and posessor in bad faith, the true test of his liability is how, and to what extent he has misused his mortgage and possession to mortgagor's disadvantage and injury.

TENDER.

When this court in its decree at the Oct. Term of 1877, (Ib., 96 Otto p. 339), in fixing the time from which

Davis "should be charged for the use and occupation "of the premises from the time he took possession in "1865, must have fixed that period for this purpose, from some data.

It must have been because of the tender by Peugh in that year, and the refusal to receive the money. When Peugh learned that Davis claimed ownership, he at once sought him and as Davis himself says, tendered him the money due him and one per cent interest on all the money Davis had paid out on this transaction.

This, Davis "confessed and at p. 125 of the *record of that term of the court*, and says, 'I told him I'd do no such thing."' At page 105 Record of 1877, Davis says, "I declined it, the money," Similar refusals are referred to at pages 119, 120, 125 and 129 Ib.

As the case was fully considered at that term of this court, it is hoped that a reference to the past will not be considered irrelevant when an interpretation of that decree is now sought.

Chief Justice Shaw in Irwin vs Gregory 3 John. p. 523, says; "fraud cannot be conceived, without damage in fact".

Mr. Justice Story, 2 Story's Eq., says; "Holding with notice of an adverse claim he is bound to be treated as a wrongful possessor".

Domer vs Fortescue, 3 Atkins, p. 130, says; "If he had had notice of the instrument under which adverse title may be advanced he is a wrongful possessor."

The testimony shows that this property could have been sold for over $40,000, during Davis' unlawful possession.

Davis' debt etc., all told was less than $6,000. Had

he sold the property he would have been answerable for the amount of sale, less the loan, interest, taxes, and costs' and for the residue, with interest as Peugh's trustee, but he chose to assume all the consequences of his unlawful holding. Thus locking up some $35,000, or $40,000 surplus for years to Peugh's injury.

The moment Davis repudiated the relationship of mortgagor and mortgagee by fraudulently setting up claim of ownership in fee-absolute; at and after that moment he acted at his peril and assumed all risks.

He then and thereafter exonerated Peugh from any and all obligations to come forward with advice and assistance, and thereafter Peugh could deal with him at arms length and hold him responsible too and for all risks he assumed.

Davis standing by his fraudulent claim of ownership and as a faithless trustee and at his peril, the court should apply to him the rule applied to all other faithless trustees.

He should be held responsible for any and all loss he caused Peugh to sustain by reason of the risks he audaciously assumed.

The *ultima ratio* of a mortgage is a forclosure sale to convert the land into its money equivalent for the satisfaction of the debt and delivery to mortgagor of the surplus, if any.

This the mortgagee proceeding legitimately can do *in invitum* the mortgagor.

But the mortgage is no bar to mortgagor's negotiating an advantageous private sale to attain the same end.

It is his privilege to take advantage of enhancement

of value from any cause, permanent or tempory, to secure the largest money equivalent for his land and consequent largest surplus possible for himself, and mortgagee cannot without doing wrong and misusing his mortgage and posession of the premises, act or speak to hinder or prevent him negotiating, if he can, an advantageous private sale.

Davis, in posession and fraudulently claiming ownership, prevented Peugh negotiating such a sale.

He made no effort to effect such a sale himself. Had the sale by Peugh been permitted, the debt would have been satisfied and Peugh left a comfortable surdlus.

Will the court now permit Davis to set up his own wrong, and have Peugh now receive iess surpluss than he would have received had he been permitted to make the advantageous sale offered when the market price was high.

Nemo allegans suam turpitudinem audidenus est

MERRICK & MORRIS,
T. T. CRITTENDEN,
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Attorneys for Appellant

Opinion of Chief Justice Cartter in General Term

Mr. Chief Justice CARTTER delivered the opinion of the court:

This case involves a very simple question. The instructions to this court come from the Supreme

Court of the United States, and are dogmatic. We simply have the duty of performing that which we are charged by that court to perform: "The defendant is to be charged with a reasonable sum for the use and occupation of the premises from the time he took possession." A reasonable sum—that is, what it was worth to the defendant.

We would have no trouble about that in an ordinary case. What is the rental worth? The witnesses say, and say very truthfully, that the use and occupation were worth nothing. The property was an unfenced common within the city limits, impracticable of cultivation, impracticable of exclusive occupancy, and in fact unoccupied; the defendant had merely constructive possession of it because he claimed possession.

It is difficult to see how any value could be attached to the use and occupation of property under such circumstances. But it is contended for the complainant that the use of the property is worth six per centum of its value. And what is its value is another matter of speculation. One standard is the assessed valuation, and another the estimated market value. And the defendant has been charged a per centage on valuation, as though the property has a usufruct, as though it were tenantable, as though it were under actual occupancy and yielding something to the mortgagee.

We think that the decrees below are too imaginary, are a departure both from the facts of the case and from the decree of the Supreme Court. The real value of the property is not the measure of the use; the returns the property may give the tenant constitute the value of the use, and there is no other guide. We have come to the same conclusion with the witnesses.

The use and occupation of the premises was worth nothing, and, therefore, we will charge nothing for it.

But it is said further, that the mortgagor was deprived of the power to sell the property; that this controversy arrested his dominion over it. Is a claim on that account a claim for use and occupation? For the rental value of the property? Is it not a claim for unliquidated damages, as for obtruding an obstacle in the way of disposing of the property? it seems to us that that is not germane to use and occupation, and to that we are confined.

There remains but one minor point. The defendant received from the Government of the United States a sum of money for the occupation of the property by the military. Of this sum he paid a portion as a commission to the agent who collected it, and the court below did not credit him with the commission so paid. He should be allowed credit for that sum and be charged only with what he got over and above it.

Decree accordingly.

113-542

Supreme Court of the United States.

OCTOBER TERM, 1884.

SAMUEL A. PEUGH, *Appellant*,

vs.

HENRY S. DAVIS, *Appellee*.

No. 756

Brief in Behalf of the Appellee.

ALBERT G. RIDDLE,
HENRY E. DAVIS,
For the Appellee.

R. O. Polkinhorn & Son, Printers, Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1884.

SAMUEL A. PEUGH, *Appellant*,
vs.
HENRY S. DAVIS, *Appellee*.
No. 756.

Brief in Behalf of the Appellee.

Statement of the Case.

The bill in this cause was filed in the Supreme Court of the District of Columbia, on the 13th day of July, 1869. Its object was to declare certain instruments, absolute in form, conveying to the appellee squares No. 910 and 911 in the city of Washington, to constitute a subsisting mortgage; and to enable the appellant to redeem the said squares from the indebtedness alleged to be secured by those instruments.

The appellee's answer admitted the first instrument to have been intended to secure a sum of money loaned the appellant; but contended that the object and effect of the second was to extinguish the appellant's equity of redemption.

After hearing on the pleadings and testimony, the Supreme Court of the District of Columbia, in Special Term,

dismissed the bill; which action of the Special Term was affirmed by that Court in General Term.

From the action of the General Term the appellant appealed to this Court, which, on the 15th day of April, 1878, reversed the decree and remanded the cause.

In its opinion, this Court held the two instruments to be a subsisting security of an indebtedness from the appellant to the appellee, and decreed a redemption. In directing the account between the parties, the Court said: "The defendant [appellee], should be charged with a reasonable sum for the use and occupation of the premises from the time he took possession in 1865, and allowed for the taxes paid and other necessary expenses incurred by him." (See the report of the case, 96 U. S., 332).

In obedience to the mandate of this Court, which was filed in the Supreme Court of the District, on October 7, 1878 (Rec., pp. 12–13), the latter court, on November 23d, following, referred the cause to its auditor to state the account. (Do. p. 13).

The auditor reported on February 21st, 1880, charging the appellee for use and occupation (the premises being unimproved and unused), six per centum on the value; and refusing him allowance for two sums paid an attorney for collecting from the United States two claims for occupation of the premises by the military during the civil war (Do. pp. 13–17). On exceptions by both parties this report was set aside November 5, 1880, and the cause again referred for the statement of "an account between the parties hereto in accordance with the opinion and decision of the Supreme Court of the United States;" and the decree proceeds:

> "The opinion of that Court declares that the defendant should be charged a reasonable sum for the use and occupation of the premises during his possession. The testimony taken in the cause shows that the premises were of no value to the defendant in respect of use and occupation in the usual import of those terms; but it

appearing to the Court that under the circumstances of the present case, use and occupation may be held to include some reasonable compensation to the complainant for loss by reason of such use and occupation, whereby he was prevented from developing and disposing of the property, the auditor is directed that the defendant be charged, as representing such compensation, the annual general taxes and also one or two per cent. per annum upon the market value of the property, to be fixed by the auditor.

"The defendant should be . . . charged with the sums received by him from the Government of the United States . . No tender has ever been made by the complainant to the defendant of the debt, interest, &c., herein involved." (Do. pp. 53–4).

Under this direction, a second Auditor's report was filed June 7, 1881, fixing a market-value for the premises, and, by way of charge as for use and occupation, charging the appellee one per centum on that value, and refusing him allowance for taxes paid since 1865. The allowance for fees paid the attorney who collected the claims against the United States was also still refused. (Do. pp. 54–7).

On exceptions, the Court in special term confirmed this report in all respects, except as to the market-value, which the Court fixed at the assessed valuation of the premises; and by the same decree, October 6th, 1881, an amount due was found, a time for redemption fixed, and a sale ordered in default thereof (Do. pp. 99–100).

From this decree both parties appealed to the Court in General Term (Do. pp. 101, 110).

On hearing on these appeals the Court in General Term, on October 30th, 1882, holding both that the appellee was not to be charged anything as for use and occupation for his technical possession of unimproved premises, and also that he was entitled to allowance for the fees paid the attorney collecting the claims against the United States, decreed as follows (Do. pp. 101–3).

(1.) That the decrees in Special Term of November 5th, 1880, and October 6th, 1881, be reversed and held for naught;

(2.) That the reports and statements of account by the two Auditors be set aside;

(3.) That on October 23, 1882, there was due the defendant (appellee) from the complainant (appellant) in the premises a stated sum; and—

(4.) That unless the sum thus stated should be paid by a day certain, the premises involved should be sold upon certain specified terms and conditions.

From this decree the complainant has appealed to this Court.

The opinion of the Supreme Court of the District of Columbia, in General Term, is appended. (*Post*, p. 16.)

Assignment of Errors.

The errors claimed by the appellant in the action of the court below are as follows:

(1). In holding that no tender was ever made by the appellant to the appellee of the amount due in the premises;

(2). In allowing the appellee the amounts paid by him as fees to the attorney who collected the claims against the United States;

(3). In charging the appellee nothing for use and occupation of the property in controversy.

Argument.

I.

The pretence of a tender is not entitled to notice, and would be allowed to pass unobserved but for the vigor with which it was persisted in to the court below. The alleged "tender" is claimed to appear in certain statements of the

appellee while under examination on the main controversy of the cause: to the effect that, about or shortly before October, 1865, the appellant *proposed* or *offered* to repay the appellee all the money paid and expended on account of the property, with interest; which *proposition* or *offer* the appellee declined. (Orig. Rec., pp. 105, 119, 120.)

There is no word from the appellant on this subject. There is nowhere in the testimony any pretence that at any time the appellant proposed or offered to pay, much less tendered, the appellee any sum of money whatever in the premises.

A good and sufficient tender by the mortgagor to the mortgagee of the amount due on account of the mortgage at the time of tender—including principal, interest, expenditures, &c.—will operate to stop the running of interest in favor of the mortgagee. This proposition admits of no discussion.

And what constitutes a good and sufficient tender to operate a stoppage of interest is equally certain. To establish such tender it must appear affirmatively (*a*) that the debtor had the amount immediately at hand ready to deliver it and actually produced and offered it unconditionally, or (*b*) that offering to pay and having the amount immediately at hand and being ready to deliver it he was about to produce it but was stopped by the creditor, and (*c*) that the tender so made was kept good: that is, that the money tendered was kept appropriated to the debt so that the debtor lost the interest upon it. The authorities to this effect are practically innumerable.

See—

2 Greenl. Ev., Secs. 600–606, and cases;
3 Bl. Com., 304, note;
5 N. H., 440; 7 N. H., 535; 8 Greenl., 107;
6 Pick., 356; 8 Ohio, 169; 15 Wend., 637;
21 Iowa, 590; 34 Ala., 126; 22 Ill., 643;
Bissell vs. Hayward, 6 Ohio, 587.

And an averment in a bill of readiness to pay, or even a tender of payment accompanying the offer to redeem in a bill for that purpose, will not constitute a good and sufficient tender to operate a stoppage of interest, unless the money tendered be actually paid into court and left there.

Shields vs. *Lozear*, 7 C. E. Green, 447;
De Wolf vs. *Long*, 2 Gilm., 672;
4 Scam., 267; 7 B. Mon, 279; 5 Mon., 36.

II.

Nor is the attempt to deny to the appellee allowance for the sums paid on account of the collection of the claims from the United States entitled to serious consideration.

It may be said, generally, that in addition to his debt and interest, a mortgagee in possession is entitled to allowance for expenditures made by him in the proper management of the estate; for such repairs as are necessary for the support of the property; and for all sums expended by him in support and protection of the title. Such are the "necessary expenses" for which, in addition to the "taxes paid," the defendant is to be allowed in accordance with the direction of this Court.

See 2 Dan. Ch. Pl., 1245 and 1246, and notes;
2 Lead. Cas. Eq., p't II., 1980 and cases;
1 G. & J., 305.

And a mortgagee may charge for the services of an agent employed by him to collect rents when a prudent owner, acting for himself, would probably have done so.

Davis vs. *Dendy*, 3 Mad., 170;
Harper vs. *Ely*, 70 Ill., 581;
2 Dan. Ch. Pl., 1246, note 5 and cases.

A *fortori* should the charge be allowed when the rent is the nature of an unadjudicated claim. The employment in this case was proper and necessary, and the commission paid not unusual. To collect such claims one must possess the necessary experience and attainments, besides devoting much time to each claim; the appellee could not be required to attain the requisites and make an extraordinary expenditure of time for the purposes of that one claim. And that his employment of the agent was "as of a prudent owner acting for himself" is not open to discussion, since at the time of the collection (Rec., p. 40), the court below had twice declared him owner of the property.

III.

The only substantial controversy now remaining in the cause is that raised by the appellant's objection to the action of the court below in respect of charging the appellee for use and occupation.

The appellant's contention is that to charge the appellee nothing is practically to nullify the direction of this Court, in deciding the main question originally at issue between the parties, "that the defendant should be charged a reasonable sum for the use and occupation of the premises from the time he took possession in 1865." This position was taken by appellant's counsel in their brief on the argument in the court below, wherein it was urged: "The decree of November 4, 1880, . . . is a palpable attempt to nullify the opinion and the mandate of the Supreme Court." And in the brief in opposition to the motions to vacate the *supersedeas* and to dismiss the appeal, heretofore submitted to this Court, the decree of October 30th, 1882, is characterized as setting its mandate at defiance.

This Court's opinion is easily to be understood in the light of a consideration of the liability assumed by a mort-

gagee who enters into possession of the mortgaged premises.

a. By taking possession the mortgagee imposes upon himself the duty of a provident owner, and he is bound to recover what such an owner would, with reasonable diligence have received. He will be accountable for the rents and profits actually received, but nothing more, unless they were reduced or lost by his wilful default or gross negligence.

Hughes vs. *Williams*, 12 Ves., Jr., (Sumn. Ed.), 493, (*a*), and cases;
Robertson vs. *Campbell*, 2 Call, 428;
Ballinger vs. *Worsley*, 1 Bibb, 195.

b. If a mortgagee be actually in possession *in propria persona*, he should account for the reasonable, that is the natural and ordinary, value of the use. If he be in possession *by a tenant*, he should account for no more than the rent reserved; unless by fraud or wilful neglect he has received less than he might have gotten.

Bainbridge vs. *Owen*, 2 J. J. Marsh., 463;
2 Pow. Mort., 1028.

c. A mortgagee in possession shall not account according to the value of the land. He shall not be bound by any proof that the land was worth so much, unless you can likewise prove that he actually did make so much of it, or might have done so but for his wilful default, *where that special liability attaches;* as, if he turned out a sufficient tenant that held it at so much rent, or refused to accept a sufficient tenant that would have given so much for it.

Anonymous, 1 Vern., 45;
Hughes vs. *Williams*, *ubi supra*.

d. If the mortgagee himself occupies the premises, he is responsible for reasonable rent.

Tucker vs. *Buffum*, 16 Pick., 46;
Bainbridge vs. *Owen*, *ubi supra*.

In making its decree herein this Court applied these principles, thus: There were no rents received from the property during the defendant's occupation; he is not liable for wilful default, as he was in possession *in propria persona* and not by tenant, nor, having entered, did he turn out sufficient tenants or refuse any who offered themselves: therefore, not being able to account for what he did not get, and not being chargeable for wilful default, he is "responsible for reasonable rent" only, or, in other words, "a reasonable sum for use and occupation."

This seems simple enough; but the appellant's counsel view the matter in a somewhat different light. In their brief below they held this language: "The plain question to be determined is this; When a mortgagee *wrongfully* takes possession of mortgaged property, and holds that possession for years against the lawful owner, thereby preventing that owner from selling or using it or availing himself in any manner of it, what *compensation* should he be required to render to the owner?"

It may be premised that the appellee did not take possession wrongfully: there was no provision in the instruments of mortgage that the appellant should remain in possession until default, (1 Jones, Mort. sec. 702, notes and cases); and entry was not made until long after any interest even had been paid, and long after default in payment of the principal debt; nor until after the appellee had paid all taxes and charges against the property for nine years, without any reimbursement whatever.

On November 1, 1865, the approximate date of entry fixed by this Court, the appellant owed on account of principal, $1,804.53; on account of expenditures, $696.28, and on account of interest, $1,123.72, aggregating $3,624.53; in respect of which and of each item thereof, he was entitled to no credit whatever. So that the appellee's possession

was lawful and rightful, and would so have been even had the premises been under rent at the time, which they were not.

Nor can the appellant be heard to complain of being "prevented from selling or using or availing himself in any manner of 'the property in question.'" In a case where the entry is lawful, it is the mortgagor's fault that the mortgaged premises fall into the hands of the mortagee; and if the appellee's occupation was disadvantageous or undesirable to the appellant, the latter has himself to blame: he should have made payment or tender to the appellee. If the use was of so much value as is pretended by him, the appellant could readily have found means to discharge his indebtedness, and have put the property to such use as he could have found so profitable. Having stood by without action, he cannot now be heard to claim "compensation" for the alleged consequences of his inaction.

And even supposing this Court in its opinion to have contemplated such compensation to the appellant, what would it amount to in the light of the facts? To what use could he have put the premises? and in what manner could he have availed himself of them?

The property involved in this litigation is unimproved and unenclosed, and it is what is known as "outlying" or "outside" property, being situated away from the business and residence centres of the city. (Rec., pp. 79–80, 87.) The case is absolutely without *data* for the establishment of a definite money value of the premises based upon demand. There is testimony, it is true, as to the sale of lots and parcels of ground here and there in the neighborhood, but manifestly such testimony alone furnishes no criterion of value. Those who purchased may have been the only ones desiring to do so, and the particular parcels

bought by them may have been the only ones they desired. Up to 1872 there was more than plenty of such property as these squares lying about the city undemanded and undesired. In 1872–3, there was a speculative demand for much property of a similar character, consequent upon the inflation of values prevalent at the time, and the extensive "improvements" going on under the "comprehensive system," which brought about the overthrow of the Government responsible for it. The results of the speculations in such property at that time were notoriously disastrous, and the witnesses produced by the complainant himself to prove the value of this property were conspicuous victims of the delusion that the "comprehensive system" and the inflation of the period would materially and permanently enhance the market value of property in the very neighborhood concerned (Chappel, Cate, Moses Kelly, &c). (Rec., pp. 65–6, 67–8, 74, 88, 90, 97–8.) From 1873–8, there was only a slight demand for home sites, and none whatever otherwise; single improved *lots*, forced into the market, selling for less than the value of the improvements thereon. (Do., p. 82.) In the light of the testimony, it is not unfair to say that the appellee's possession cost the appellant nothing more than the loss of a problematical opportunity of unfortunate speculation in 1872–3.

But the contention of the appellant is in law, as well as in fact, wholly without support.

The appellee should be charged only the value of the use of the property; and in no event should he be charged as for speculative or problematical damages, or damages of any kind, to the appellant.

He is chargeable only for "the natural and ordinary *value of the use*," (p. 8 above.) What this is was referred by this Court for inquiry: it is a question of fact and is so to be treated. The matter was intended to be inquired into by

the Court below. The testimony there adduced by the appellant, so far as it was not pure conjecture, tended only to show (*a*) the value of the land on sale, (*b*) its value on long lease with privileges, and (*c*) what certain individuals might, under certain non-existing circumstances, have given for it on purchase or long lease with privileges; the fact that a mortgagee has only an estate at sufferance, liable to determination by the mortgagor, apparently not having seemed worth consideration.

The testimony adduced by the appellee, on the other hand, showed that the uniform object of investment in such property is to hold it for a speculative realization of profit from subsequent sale on the rise in value incident to the growth of the city: that the property as circumstanced was of no value whatever in respect of use and occupation, and would be well disposed of if let in consideration of payment of the annual taxes.

The witnesses in behalf of the appellee, as Messrs. George W. Riggs (Rec., pp. 43–4), M. W. Galt (Do., p. 45), and Henry A. Willard (Do. p. 46), besides the appellee himself (Do. pp. 47–9), all men of large means and extensive experience in real estate in the city of Washington, testify that unimproved property, such as that involved herein, is worth no rental; that they never received rental from such property; that the use of such has been given rent-free to the District government and others; and that it presents no source of profit, except in the form of increased value from the growth and improvement of the City. And of the appellant's witnesses, Mr. VanRiswick (Do. p. 77), states that the last named consideration is that which generally induces investment in that species of property; Mr. McKelden (Do. p. 20), has had no experience in renting unimproved property; Mr. Wilson's unimproved property, all of which, with trifling exceptions, is very advantageously situated, yields

him nothing (Do. p. 22); and Mr. McIntire says that it is very rare that unimproved property is rented (Do. p. 75).

The appellant, too, according to his own statement, was in possession of the property for ten years prior to the appellee's entry. What did he realize from it? What has he realized from it since the decree of this Court has established his right to it? He, as well as the appellee, has been in a position to prove the "value of the use." And that value by the appellant's own showing appears to be just what the court below found it to be: nothing.

In case of redemption of a mortgage the mortgagor comes for the favor of the court, asking to be relieved from the legal consequences of his own act; and as a condition of its favor the court exacts the payment of his debt, principal, and interest, and all reasonable expenses undergone by the mortgagee, if any. On the other hand, the mortgagee is held to accountability for all that he has received by reason of his mortgage; but it would be alarming, indeed, if he had also to compensate the mortgagor for all disadvantages resulting to him by reason of the mortgage. The principle is that the mortgagee will be allowed only satisfaction of his debt, interest, expenditures, &c. His entry is regarded solely as for the purpose of bringing about the payment of himself, in respect of which the mortgagor has proved derelict; and he is not allowed to make a profit out of his possession of the estate: *he must not get anything out of his mortgage beyond the debt, interest and expenditures.* (*Gordon* vs. *Lewis*, 2 Sumn., 143, *a* p. 155.)

In accounting the mortgagee is, therefore, charged with everything representative of value that he has had and received by reason and in consequence of his mortgage. All *value received* by him by reason of his mortgage must enure to the benefit of the mortgagor in reducing the debt. But where can a precedent be found, or what reason can be in-

vented, for charging against a mortgagee his lawful possession as a tort committed against the mortgagor, for which the mortgagee should be mulcted in damages? The assumed tort results from the mortgagor's own default: he could have prevented the entry into possession, or, at least, by making payment or tender could have placed the mortgagee in the wrong in entering. But such being not the case, how is it possible to convert the mortgagee's lawful occupation into an injury to the mortgagor for which he must have compensation? To state the position of the appellant in this particular is to confute it.

IV.

The principles governing the accounting of a mortgagee in possession being thus simple, the Court below found no difficulty in stating the account.

It is not disputed (1) that the balance of the principal debt remaining due since February 9th, 1858, is, as stated in Schedule C of Auditor Payne's report, $1,804.53; (2) that the expenditures by the appellee, as set forth in Schedule A of that report, are correctly stated and properly allowable; (3) that in 1875 and 1876 the appellee collected from the United States (on account of occupation by the military of the premises under consideration, prior to November, 1865,) the sum total of $1,266.82, one-fourth of which ($316,70), he paid as a fee to the agent who collected it; nor (4) that from November 1st, 1865, to April 15th, 1878, the appellee was nominally, and nominally only, in possession of the premises, for which he received no rents whatever, of which he made and could make no use whatever, from which he ejected no tenants, and to rent which no applications were made to him during his occupancy.

Accordingly, the decree of the Court below allows the appellee the debt, and expenditures, with interest; charges him with the net proceeds of the claims against the United States; and finding the occupation of the premises valueless, charges him nothing therefor. That decree contains no error and should be affirmed.

ALBERT G. RIDDLE,
HENRY E. DAVIS,
For the Appellee.

APPENDIX.

Mr. Chief Justice Carter delivered the opinion of the Court:

This case involves a very simple question. The instructions to this Court come from the Supreme Court of the United States, and are dogmatic. We simply have the duty of performing that which we are charged by that Court to perform: "The defendant is to be charged with a reasonable sum for the use and occupation of the premises from the time he took possession." A reasonable sum—that is, what it was worth to the defendant.

We would have no trouble about that in an ordinary case. What is the rental worth? The witnesses say, and say very truthfully, that the use and occupation were worth nothing. The property was an unfenced common within the city limits, impracticable of cultivation, impracticable of exclusive occupancy, and in fact unoccupied; the defendant had merely constructive possession of it because he claimed possession.

It is difficult to see how any value could be attached to the use and occupation of property under such circumstances. But it is contended for the complainant that the use of the property is worth six per centum of its value. And what is its value in another matter of speculation. One standard is assessed valuation, and another the estimated market value. And the defendant has been charged a percentage on valuation, as though the property has a usufruct, as though it were tenantable, as though it were under actual occupancy and yielding something to the mortgagee.

We think that the decrees below are too imaginary, are a departure both from the facts of the case and from the decree of the Supreme Court. The real value of the property is not the measure of the use; the returns the property may give the tenant constitute the value of the use, and there is no other guide. We have come to the same conclusion with the witnesses. The use and occupation of the premises was worth nothing; and therefore we will charge nothing for it.

But it is said, further, that the mortgagor was deprived of the power to sell the property; that this controversy arrested his dominion over it. Is a claim on that account a claim for use and occupation, for the rental value of the property? Is it not a claim for unliquidated damages, as for obtruding an obstacle in the way of disposing of the property? It seems to us that that is not germane to use and occupation, and to that we are confined.

There remains but one minor point. The defendant received from the Government of the United States a sum of money for the occupation of the property by the military. Of this sum he paid a portion as a commission to the agent who collected it, and the court below did not credit him with the commission so paid. He should be allowed credit for that sum, and be charged only with what he got over and above it.